# Attachment E

**REDACTED, PUBLIC VERSION**

**BEFORE THE**
**FEDERAL COMMUNICATIONS COMMISSION**
**WASHINGTON, D.C. 20554**

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| In the Matter of | ) | |
| | ) | |
| TCR Sports Broadcasting Holding, L.L.P. | ) | MB Docket No. 08-214 |
| d/b/a Mid-Atlantic Sports Network, | ) | |
| Complainant | ) | |
| | ) | |
| v. | ) | File No. CSR-8001-P |
| | ) | |
| Comcast Corporation, | ) | |
| Defendant | ) | |

To: Marlene H. Dortch, Secretary

Attn: Hon. Richard L. Sippel
Chief Administrative Law Judge

**TRIAL BRIEF OF TCR SPORTS BROADCASTING HOLDING, L.L.P.**
**D/B/A MID-ATLANTIC SPORTS NETWORK**

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## INTRODUCTION AND SUMMARY

The Federal Communications Commission ("FCC" or "Commission") has made clear that Comcast Corporation ("Comcast") – the nation's largest cable operator and one of the two largest operators of regional sports networks ("RSNs") – has a particularly strong "incentive to deny carriage to rival unaffiliated RSNs" in order to favor its own affiliated RSNs.[1] Comcast has a legal duty not to discriminate against MASN in favor of its affiliated RSNs, but it has violated federal statutory and regulatory proscriptions against such discrimination.

According to its own internal documents, Comcast's business strategy is to become [redacted][2] MASN stands in the way of Comcast achieving that objective. This case arises out of the retaliatory and discriminatory conduct by Comcast against MASN.

The undisputed facts show that Comcast considers RSN programming [redacted] Comcast sought aggressively to obtain the programming rights for the Washington Nationals ("Nationals"), but lost those rights to MASN. Comcast then sued the Baltimore Orioles ("Orioles"), MASN, and Major League Baseball ("MLB") to hold on to the contractual programming rights to Orioles games, but was unable to persuade the courts that its suit had any legal merit. After losing those programming rights to MASN – jeopardizing Comcast's efforts to dominate the market for regional sports in the Mid-

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[1] Memorandum Opinion and Order, *Applications for Consent to the Assignment and/or Transfer of Control of Licenses; Adelphia Communications Corp. to Time Warner Cable Inc.; Adelphia Communications Corp. to Comcast Corp.; Comcast Corp. to Time Warner Inc.; Time Warner Inc. to Comcast Corp*, 21 FCC Rcd 8203, ¶ 189 (2006) (MASN Ex. 221) ("*Adelphia Order*").

[2] COMMASN_00010305-20 (MASN Ex. 136).

[3] *Id.* at 00010306.

Atlantic region – Comcast retaliated by refusing to carry MASN, and the very programming that Comcast vigorously had sought, *anywhere* for more than a year.

In July 2006, after the Commission issued orders adverse to Comcast, Comcast finally agreed to carry MASN. But Comcast secretly excluded from that deal substantial portions of MASN's territory in an effort to protect the interests of its affiliated RSNs. Over MASN's geographic territory, more than [redacted] of Comcast's subscribers receive one (or more) of Comcast's affiliated RSNs, but a materially smaller number (about [redacted]) receive MASN. That difference is significant, representing approximately [redacted] subscribers in three Designated Market Areas ("DMAs"): the Harrisburg-Lancaster-Lebanon-York DMA ("Harrisburg DMA") in Pennsylvania, and the Roanoke-Lynchburg DMA ("Roanoke DMA") and Tri-Cities DMA in Virginia. To place that foreclosure in context: [redacted] subscribers are more than the number of Comcast subscribers in the cities of Baltimore and Washington, D.C.

Unlike the two cases recently before this Tribunal (which involved *national* programming on the NFL Network and Wealth TV), it is significant that this case involves *regional* sports programming. Just as Comcast's own documents make crystal clear, so too has the Commission singled out regional sports as "must-have" programming for consumers, finding that such programming "is unique because it is particularly desirable and cannot be duplicated."[4] This case involves competing RSNs owned by MASN and Comcast that are similarly situated. Both the Commission (in the *Adelphia Order*) and the Media Bureau (in the *Hearing Designation Order*[5]) have found that MASN competes directly with Comcast's affiliated RSNs. As relevant here, Comcast has divided its regional sports programming between two different

[4] *Adelphia Order* ¶¶ 124, 189.

[5] *See* Memorandum Opinion and Hearing Designation Order, *Herring Broadcasting, Inc. v. Time Warner Cable Inc.*, 23 FCC Rcd 14787 (2008) (MASN Ex. 227) ("*Hearing Designation Order*" or "*HDO*").

affiliated networks, Comcast SportsNet Philadelphia ("CSN-Philly") and Comcast SportsNet Mid-Atlantic ("CSN-MA"). Both networks are similarly situated to MASN, offering consumers an array of primarily professional local sports programming and competing for programming, advertisers, viewers, and carriage.

Because Comcast's affiliated RSNs are similarly situated to MASN, and because Comcast has foreclosed MASN to a significant number of subscribers who receive Comcast's affiliated RSNs, the legal framework adopted by the Media Bureau requires Comcast to prove that these decisions were justified. It cannot do so. The evidence is so stark that Comcast could not survive scrutiny under any legal standard.

Discovery in this case has shone light on what the Commission and independent RSNs like MASN have long feared: Comcast has structured itself in a manner that actively encourages discrimination on the basis of affiliation. Despite the requirements of law and the entreaties of the Commission, Comcast has placed no safeguards between its programming and distribution arms to prevent the affiliation-based discrimination that MASN has suffered. Just the opposite is true. Comcast's RSNs are tightly tethered to the mother ship, with overlapping executives, shared offices, the free flow of information (including the most sensitive information about its RSN competitors), and shared decision-making – including the very decision to carry MASN.

Comcast and its RSNs are so tightly entwined [redacted] This coziness is decidedly out-of-step with marketplace realities. Comcast cannot even say [redacted] have for years shared offices in the Comcast Building in Philadelphia.

Remarkably, Comcast's RSNs obtain far broader carriage without a [redacted] Further, Comcast has adopted accounting practices that ensure that an unaffiliated RSN will *always* be considered by Comcast more expensive to carry than an identically situated affiliated RSN – weighting the scales heavily in favor of its affiliates.

Additional proof of Comcast's discriminatory double-standard abounds. *First*, it is clear that Comcast would carry MASN if Comcast did not own its affiliated RSNs. All other major multichannel video programming distributors ("MVPDs") without affiliated RSNs to protect carry MASN, including within the three DMAs in dispute here. *Second*, it is also clear that Comcast would carry MASN on all of its systems if Comcast owned MASN. In vigorously seeking the rights to the Nationals, for example, Comcast promised to distribute that programming "across the Nationals territory." And, when Comcast owned the rights to Orioles programming, Comcast distributed such programming widely through its affiliated RSN, including in the three DMAs at issue here.

*Third*, Comcast treats its own RSNs more favorably than MASN. Comcast intentionally awarded its own RSNs significantly more coverage than MASN. It did so by placing arbitrary caps on the number of subscribers that it would permit MASN (but not its own RSNs) to receive, and debated whether it should decline to carry MASN in areas unless there was [redacted] to do so. Upon launching MASN in some systems after receiving pressure from the Commission, Comcast disparaged MASN. It sent subscribers a letter announcing an immediate increase in fees and laid the blame for that rate hike on MASN. No other MVPD carrying MASN raised its rates after contracting with MASN. And Comcast's executives offer no other example of when Comcast singled out another programmer – much less one of its affiliated RSNs – for a rate hike and disparagement in the marketplace. Comcast also bends over

backwards to provide its affiliated networks with more "overflow" channels for telecasting games and better technology to attract advertisers.

The defenses raised by Comcast to its discriminatory conduct are *post hoc*, pretextual, and irrelevant as a matter of law. *First*, Comcast argues that a 2006 carriage agreement with MASN gives it the right to ignore the requirements of federal law. Not only has the Media Bureau squarely rejected that claim, but this Tribunal found unpersuasive an identical argument in the carriage dispute between NFL Enterprises and Comcast. A private agreement in 2006 did not give Comcast license to violate the law in 2007. In any event, Comcast's unfair and deceptive conduct forecloses it from seeking refuge in that 2006 agreement.

*Second*, Comcast argues that there is low demand for MASN in the three DMAs at issue. That pretextual defense has been manufactured for this litigation. Comcast never considered demand in making the decision not to carry MASN in the Harrisburg, Roanoke, and Tri-Cities DMAs, and it never even mentioned low demand during the negotiations with MASN representatives in 2006. Nor do these *post hoc* assertions square with market realities: the majority of non-Comcast subscribers in the foreclosed markets obtain MASN through MVPDs that do not have an interest in protecting affiliated RSNs. Those carriage decisions are far better barometers of demand than Comcast's self-serving claims in litigation. In any event, other objective data (Nielsen ratings of television viewership) evidence impressive ratings for MASN's programming in the foreclosed markets.

Comcast's discriminatory conduct has unreasonably restrained MASN's ability to compete fairly. *First*, with respect to the specific DMAs at issue, MASN is constrained in competing at all without carriage from Comcast, which is the dominant MVPD in those areas. *Second*, the lack of carriage in those areas unfairly restrains MASN's operations as a whole. By

denying MASN access to approximately [redacted] subscribers – [redacted] of its potential base – Comcast has functionally raised MASN's average costs. In addition, by artificially limiting MASN's distribution, Comcast has made it harder for MASN to attract advertisers and to bid for sports programming, as both MASN and Comcast's affiliated RSNs seek to have their services distributed as widely as possible.

In sum, Comcast has violated the Cable Television Consumer Protection and Competition Act of 1992's ("Cable Act") and the Commission's prohibitions on affiliation-based discrimination. The Tribunal should accordingly order Comcast to carry MASN in the three DMAs at issue on the same terms and conditions as other MVPDs in these areas distribute MASN. This result is strongly in the public interest. Comcast's past conduct has demonstrated that, absent regulatory intervention, it will resist compliance for as long as possible so that it can continue to discriminate and retaliate against MASN in pursuit of its goal of dominating the regional sports marketplace. This Tribunal should end Comcast's anti-competitive conduct.

## FACTUAL BACKGROUND[6]

### A. MASN's Creation

In 1996, the Orioles formed TCR Sports Broadcasting Holding, L.L.P. ("TCR") as a holding company for the franchise's television rights. In 1996, TCR agreed to license for 10 years the rights to televise certain Orioles games to Home Team Sports ("HTS"), an RSN unaffiliated with any cable distributor at that time. Comcast acquired HTS in 2001 and rebranded the RSN as CSN-MA. Shortly thereafter, Comcast rejected a deal to continue producing over-the-air telecasts of Orioles games, which led the Orioles to form a production unit of TCR for that purpose. Beginning in 2002, the Orioles Baseball Network produced and

[6] MASN hereby incorporates the full factual allegations set forth in its Carriage Complaint (MASN Ex. 218) ("Compl.").

telecast the Orioles games on over-the-air television, while CSN-MA produced and exhibited Orioles games on pay television. At or about that time, TCR announced publicly its intent to launch a 24/7 RSN programming service when its licensing agreement CSN-MA (as successor to HTS) expired at the end of the 2006 MLB season.[7] Comcast accordingly had notice from an early date that TCR would not be renewing its licensing with CSN-MA set to expire after the 2006 MLB season: beginning in the 2007 MLB season, TCR planned to produce and exhibit Orioles games itself. (As discussed below, Comcast filed a lawsuit attempting to maintain those Orioles rights on CSN-MA.)

In 2004, MLB Commissioner Allen H. (Bud) Selig announced that the Montreal Expos franchise would be relocated to Washington, D.C., becoming the Nationals. The decision was controversial because of the effect that a new adjacent franchise would have on the Orioles, which derived many of its fans from the Washington, D.C. metropolitan area and which had an exclusive television territory that included the District of Columbia. The relocation of the Nationals also set off a competition for the rights to telecast Nationals games, with Comcast engaging in an aggressive effort to obtain those rights for its affiliated RSN, CSN-MA. Ultimately, MLB came up with a creative solution, agreeing to the Orioles' proposal to share the Orioles' television territory with the Nationals and to pool the two teams' telecast rights in a single RSN controlled by the Orioles, with the profits of the RSN split between the two teams. That agreement, struck on March 28, 2005, called for TCR to re-brand its network as the "Mid-Atlantic Sports Network" or MASN.

MASN is an independent, team-owned RSN that now telecasts virtually all of the games of both the Orioles and the Nationals. MASN launched its telecasts of Nationals games on

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[7] *See* Bruce Miller, *Orioles TV Network ready for 24/7* sports coverage, The Daily Record, June 8, 2002 (MASN Ex. 232).

Opening Day of the 2005 MLB season, the Nationals' inaugural season. Beginning with the 2007 MLB season, MASN commenced its telecasts of Orioles games. During the 2008 MLB season, MASN produced and exhibited 321 live MLB games – more professional baseball than any other RSN in the country and well within the top handful of RSNs with respect to live major professional sports programming. All told, MASN telecast more than 600 live professional and collegiate sporting events (one of the highest totals of any RSN in the country) as well as the pre-season games of the Baltimore Ravens NFL franchise.[8]

**B. Comcast and Its Affiliated RSNs**

Comcast is the "largest MVPD" in the United States and in MASN's television territory.[9] Comcast also owns and operates multiple programming networks,[10] including two affiliated RSNs that compete in the same geographic area as MASN: CSN-MA and CSN-Philly. Thus, MASN not only depends critically on Comcast for distribution of its programming, but also competes directly with Comcast's affiliated RSNs to be able to televise that programming. This economic situation – in which a downstream distributer also owns some of the suppliers of inputs used to provide the downstream service – is known as "vertical integration."

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[8] *See* Written Direct Testimony of James Cuddihy ¶¶ 20, 24 (Attach. A to Prehearing Submission of TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network ("Prehearing Submission")) ("Cuddihy Test.").

[9] *Adelphia Order* ¶ 7.

[10] *See, e.g., id.* ¶ 8 & nn.31-32 (noting that "Comcast owns attributable interests in nine national video programming networks" and "eight regional sports networks"); COMMASN_00006614, 00006624 (MASN Ex. 134) [redacted]; COMMASN_00010383-98 (MASN Ex. 137).

CSN-MA and CSN-Philly are, like MASN, RSNs that compete in the Mid-Atlantic region. Comcast's affiliated RSNs, like MASN, telecast major professional sports programming throughout Comcast's footprint (i.e., the Washington Wizards, Washington Capitals, Philadelphia Phillies, and Philadelphia Flyers) in accordance with league-imposed territorial restrictions. In fact, Comcast has previously carried the Orioles on CSN-MA, and it tried to obtain the rights to both the Orioles and the Nationals for CSN-MA in the 2004-2005 time period, when MASN was preparing to launch as a full-time programming network. Both MASN and Comcast's RSN also complement their line-ups of major professional sports with extensive college sports programming.

Comcast's vertical integration is vital to understanding this case. Congress enacted the prohibition on discrimination that lies at the core of this litigation based on legislative findings that the melding of a cable company's distribution facilities with the ownership of programming networks would create powerful economic incentives for such cable operators to discriminate against unaffiliated networks by affording them less favorable treatment than affiliates. As a Senate Report accompanying the Cable Act explained, "[y]ou don't need a Ph.D. in Economics to figure out that the guy who controls a monopoly conduit is in a unique position to control the flow of programming traffic to the advantage of the program services in which he has an equity investment and/or in which he is selling advertising availabilities, and to the disadvantage of those services . . . in which he does not have an equity position."[11] The evidence in this proceeding will make clear that Comcast has engaged in a pattern and practice of the very conduct that Congress predicted and sought to prevent.

[11] S. Rep. No. 102-92, at 25-26 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1158-59.

### C. Major League Baseball in the Harrisburg, Roanoke, and Tri-Cities Designated Market Areas

Pursuant to the by-laws of MLB, MLB is assigned television rights to certain geographic regions.[12] MLB assigns territories by Designated Market Areas ("DMAs"), which are areas made up of contiguous counties jointly covered by a group of television stations, or subsections of DMAs.[13] Because MLB teams reside in only 17 of the nation's 50 states, it is common for baseball franchises to have television territories encompassing more than just the state where the team is located. Certain MLB territories are assigned exclusively to one MLB team, while others are shared.[14] The Television Territory for MASN as an RSN is coextensive with the MLB-assigned territories of the Orioles and the Nationals and consists of the entire states of Virginia, Maryland, and Delaware; the District of Columbia; certain parts of southern Pennsylvania and eastern West Virginia; and a substantial part of North Carolina.[15]

On or before 1981, MLB determined that television rights in the Harrisburg DMA should be shared among the Orioles, the Phillies, and the Pittsburgh Pirates.[16] MLB's decision recognizes that only approximately 75 miles separate Harrisburg and Baltimore, whereas the distance between Harrisburg and Philadelphia is approximately 95 miles, and the distance

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[12] *See* Written Direct Testimony of Mark C. Wyche ¶ 4 (Attach. D to Prehearing Submission) ("Wyche Test.").

[13] *See* 17 U.S.C. § 122(j)(2)(C) (citing the area as defined by Nielsen Media Research); *see also* Memorandum Opinion and Order, *Armstrong Utilities, Inc. Petition for Modification of the Philadelphia, Pennsylvania DMA*, 21 FCC Rcd 13475, ¶ 2 (2006); 47 C.F.R. § 76.55(e).

[14] *See* Wyche Test. ¶¶ 4-6.

[15] *See id.* ¶ 6.

[16] *See id.*

between Harrisburg and Pittsburgh is more than 200 miles.[17] The Harrisburg DMA has, since at least 1981, been an important source of fan support for the Orioles.[18] As a result of the 2005 Settlement Agreement that brought the Montreal Expos to Washington, D.C., the Orioles now share the franchise's television territory with the Nationals, meaning the Nationals are a hometown team in the Harrisburg DMA.

Furthermore, in or around 1981, MLB designated the Orioles as the exclusive MLB team throughout the Commonwealth of Virginia, including in the Roanoke DMA and the Tri-Cities DMA (collectively, "southwestern Virginia DMAs").[19] The Nationals are therefore also now a hometown team in those DMAs.

Professional baseball is one of the most popular sports in the United States. In 2008, more fans attended MLB games than any other professional sport in the country.[20] It is thus not surprising that a hometown baseball team typically generates substantial fan interest – including a desire to follow a team across an MLB season by watching games on television. In fact, Orioles baseball games have been televised in the Harrisburg and the southwestern Virginia

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[17] *See, e.g.*, Baltimore Orioles, Directions & Parking Info., http://baltimore.orioles.mlb.com/bal/ballpark/directions.jsp (MASN Ex. 16) (including driving directions to Camden Yards from "York, Harrisburg, [and] Central PA").

[18] *See* Cuddihy Test. ¶ 20.

[19] *See* Wyche Test. ¶ 6.

[20] *See* Maury Brown, The Biz of Baseball, *Inside the Numbers: 2008 MLB Attendance* (Oct. 2, 2008), http://www.bizofbaseball.com/index.php?option=com_content&view=article&id=2510:inside-the-numbers-2008-mlb-attendance&catid=29:articles-a-opinion&Itemid=41 (MASN Ex. 114) ("The 2008 Major League Baseball regular season is the second highest attendance mark in history, drawing 78,624,324, falling just 1.14 percent below last year's record of 79,502,524 in paid attendance, a sign that baseball's popularity remains exceptionally strong.").

DMAs since the late 1980s. For a substantial part of that time, Comcast's affiliated RSN, CSN-MA, carried Orioles games in those areas.[21]

## D. Comcast's History of Affiliation-Based Discrimination Against MASN

### 1. MASN's Unsuccessful Attempt To Obtain Carriage in 2005

Since before its launch as a 24/7 network in July 2006, MASN has been seeking carriage agreements with MVPDs throughout MASN's Television Territory. MASN has been successful in reaching carriage with numerous MVPDs, including Antietam, Armstrong, Atlantic, Bay Country, Charter, Clearview, Cox, DirecTV, Dish, Easton, FirstCom, Kuhn Communications, Mediacom, Metrocast, Millennium, Ntelos, OpenBand, Old Town Community Systems, RCN, and Verizon. Tellingly, MASN has encountered resistance to carriage from only two major MVPDs – Comcast and Time Warner Cable ("TWC") – both of which are vertically integrated with competing RSNs to protect.

Since 2005, MASN has sought carriage on all of Comcast's cable systems located within MASN's Television Territory. A team of MASN representatives first met with Comcast in April 2005 to discuss the possibility of carriage. MASN at that time made a request for Comcast to carry MASN on its cable systems throughout MASN's Television Territory.[22]

MASN's initial efforts to reach an agreement with Comcast were unsuccessful. Indeed, as is recounted in an earlier carriage complaint filed with the Commission,[23] rather than negotiate

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[21] *See* Cuddihy Test. ¶ 12. The other geographic areas at issue in this case also fall within the MLB-assigned television territory for which the Orioles and Nationals have exclusive television rights and thus constitute a natural fan base for those teams.

[22] *See* Written Direct Testimony of David Gluck ¶¶ 11-12 (Attach. B to Prehearing Submission) ("Gluck Test.").

[23] *See* Carriage Agreement Complaint, *TCR Sports Broadcasting Holding, L.L.P. v. Comcast Corp.*, MB Docket No. 06-148, CSR-6911-N (FCC filed June 14, 2005) (MASN Ex. 224) ("2005 Carriage Complaint").

with MASN in good faith, Comcast began a systematic campaign to undermine MASN in retaliation for the fact that Comcast had sought to obtain the rights to the Nationals games and to retain the telecast rights to Orioles games. In addition, Comcast's internal documents demonstrate that Comcast's resistance to a carriage deal was motivated by a desire to protect the interests of Comcast's affiliated networks.[24]

Comcast understood that the assignment of Nationals rights to a competing, unaffiliated RSN and Comcast's imminent loss of Orioles rights had the potential to cripple CSN-MA in the Mid-Atlantic region. Comcast responded to that threat to its affiliated *RSN* by leveraging its status as the dominant *MVPD* in key parts of MASN's Television Territory to undermine MASN at every turn. After the 2005 Settlement Agreement that brought the Nationals to Washington and led to the establishment of MASN, Comcast refused for 16 more months to negotiate seriously for carriage of MASN anywhere in MASN's Television Territory. Less than one week after MASN went to Philadelphia to meet with Comcast in April 2005, CSN-MA filed a lawsuit in Maryland based on MASN's decision to produce Orioles games itself. During the time that lawsuit was pending,[25] Comcast refused to negotiate with MASN.

Besides the lawsuit, and on numerous occasions, Comcast attempted to persuade MLB to terminate its agreement with MASN and instead to grant the rights to Orioles and Nationals games to CSN-MA.[26] Comcast also threatened multiple MVPDs in MASN's Television

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[24] *See infra* pp. 30-33.

[25] MASN successfully defended its rights in Maryland state court, which twice dismissed Comcast's complaint for failure to state a claim. *See* Assoc. Press, *Judge dismisses Comcast suit against Orioles, MASN*, Oct. 5, 2005 (MASN Ex. 9).

[26] *See* Tom Heath, *Orioles Accuse Comcast of Intimidating Cable Prospects,* Wash. Post, May 24, 2005, at D1 (MASN Ex. 10).

Territory with lawsuits if they contracted with MASN and sent letters to every member of Congress in an attempt to undermine MASN's efforts to secure carriage agreements.[27]

In light of that conduct, MASN was compelled to seek relief from this Commission. In June 2005, MASN filed a carriage complaint pursuant to the Cable Act and the Commission's rules. MASN alleged that "Comcast has unreasonably restrained the ability of [MASN] to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors" and that Comcast "has taken actions that have the effect of constituting a demand for a financial interest in a nonaffiliated video programming vendor as a condition of carriage on Comcast's cable systems."[28] MASN requested, among other things, that the Commission "order Comcast to provide carriage on all Comcast systems."[29]

### 2. MASN's Carriage Complaint and the *Adelphia Order*

In 2005, Comcast and TWC applied for the Commission's approval to acquire the cable assets of Adelphia Communications Corporation ("Adelphia") and to swap certain assets between them. As described further below, the effect of that transaction was to increase Comcast's consolidation (or clustering) in certain regions and thus to increase Comcast's incentive and ability to discriminate against unaffiliated RSNs such as MASN. MASN accordingly submitted comments in the Adelphia proceeding asking the Commission to impose conditions on any Commission approval of the transaction.[30]

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[27] *See* 2005 Carriage Complaint at 25-26.

[28] *Id.* at 1-2.

[29] *Id.* at 33.

[30] *See* Petition of TCR Sports Broadcasting Holding, L.L.P. to Impose Conditions or, in the Alternative, to Deny Parts of the Proposed Transaction, *Applications for Consent to the Assignment and/or Transfer of Control of Licenses; Adelphia Communications Corp. to Time Warner Cable Inc.; Adelphia Communications Corp. to Comcast Corp.; Comcast Corp. to Time*

This Commission approved the transaction, but imposed an arbitration remedy for unaffiliated RSNs in doing so. The Commission found that the transaction would increase Comcast's "incentive and ability" to discriminate against unaffiliated RSNs.[31] To remedy that concern, the Commission adopted a condition "allowing unaffiliated RSNs" – such as MASN – "to use commercial arbitration to resolve disputes regarding carriage on [Comcast's] cable systems."[32] The Commission emphasized that the purpose of the remedy was to "alleviate the potential harms to viewers who are denied access to valuable RSN programming during protracted carriage disputes."[33] Under the *Adelphia Order*, RSNs had 30 days from the denial of carriage or "ten business days after release of [t]he Order" to file for arbitration.[34]

An additional facet of the *Adelphia Order* relevant here is that the Commission was statutorily charged with determining whether the transaction was in the "public interest."[35] To that end, Comcast committed to the Commission that the result of the transaction would be an upgrade to Adelphia's antiquated cable systems. Both TWC and Comcast stated that the transaction would lead to rapid upgrades and to the "accelerated deployment of advanced services."[36] This Commission relied on those representations: as the then-Chairman explained,

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*Warner Inc.; Time Warner Inc. to Comcast Corp.*, MB Docket No. 05-192 (FCC filed July 21, 2005) (MASN Ex. 226).

[31] *Adelphia Order* ¶¶ 116, 189.

[32] *Id.* ¶¶ 181, 190.

[33] *Id.* ¶ 191.

[34] *Id.* ¶ 190.

[35] *Id.* ¶ 4.

[36] *Id.* ¶ 3.

Comcast "committed to make long-needed upgrades to [Adelphia] systems to enable the rapid and widespread deployment of advanced services to Adelphia subscribers."[37]

Within days of the *Adelphia Order*, the Commission issued an additional order finding that MASN had established a *prima facie* case under the Cable Act's and the Commission's non-discrimination rules against Comcast.[38] To address remaining factual issues, including those relating to remedy, the Commission referred the matter to an administrative law judge ("ALJ"). The Commission stayed the order, however, to give MASN an opportunity to decide whether to proceed with the complaint proceeding or the arbitration procedure as provided for by the *Adelphia Order*. The Commission gave MASN 10 days from release of the order to decide whether to pursue arbitration under the *Adelphia Order* or referral to an ALJ.[39]

### 3. The 2006 Carriage Agreement Between MASN and Comcast

In the wake of the Commission's decisions in the *Adelphia Order* and the *MASN Order*, MASN and Comcast entered into settlement negotiations during which MASN sought a carriage agreement with Comcast. These negotiations occurred under great time pressure given the Commission's 10-day time limit for MASN to decide, by August 4, 2006, whether to file an arbitration demand or to proceed with the complaint before an ALJ.

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[37] *Id.*, Statement of Chairman Martin; *see also id.*, Dissenting Statement of Commissioner Copps ("Let me state upfront that the Applicants come to us with what I believe is a commitment to update and upgrade the failing Adelphia cable systems. I commend their intention to modernize these networks."); *id.*, Statement of Commissioner Adelstein (noting that "Comcast and TWC have pledged to invest over $1.6 billion to upgrade Adelphia's network").

[38] *See* Memorandum Opinion and Hearing Designation Order, *TCR Sports Broadcasting Holding, L.L.P. v. Comcast Corp.*, 21 FCC Rcd 8989, ¶¶ 11-12 (2006) (MASN Ex. 223) ("*MASN Order*").

[39] *Id.* ¶ 13. The order provided no mechanism for any party to seek a continuance of that time deadline other than through the normal process of obtaining a stay.

On July 25, 2006, MASN sent Comcast a draft Term Sheet containing the same terms and conditions on which other MVPDs had agreed to carry MASN. The Term Sheet made clear that MASN was seeking carriage throughout its Television Territory, by providing a geographic map of MASN's Television Territory and indicating that Comcast was to launch MASN on "all Comcast systems" within that territory. Attached to the Term Sheet was a blank "List of Systems" page for Comcast to fill in the names of each of its systems within MASN's territory.[40] Because cable operators have superior – and often the only – knowledge of the names and locations of their cable systems, as well as the numbers of subscribers served by each system, it is industry practice for the cable operator to fill in the List of Systems during the course of carriage negotiations.[41] With respect to RSNs that have defined television territories, it is also an industry norm that, unless otherwise specifically agreed to or noted by the parties, the List of Systems will include *all* systems within the RSN's territory.[42]

On the evening of August 2, 2006 – only two days before MASN's window to file an arbitration demand was set to expire – Comcast signaled its intent to get the deal done and scheduled a call for the next day, August 3.[43] That same day, MASN had sent Comcast a revised draft Term Sheet that, like the previous draft, contained a map of MASN's Television Territory, a description that "all Comcast systems" were to be launched, and a blank List of Systems.[44]

On August 3, 2006, the parties conducted meaningful discussions about the Term Sheet for the first time. During those discussions, Comcast raised a concern that it currently lacked

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[40] *See* Gluck Test. ¶¶ 15-17.

[41] *See id.* ¶ 16.

[42] *See id.*

[43] *See id.* ¶ 18.

[44] *See id.*

bandwidth capacity to add MASN to former Adelphia systems that it had just acquired in Roanoke, Lynchburg, and other Virginia areas.[45] (Comcast did not raise similar concerns with respect to any other systems, nor did it indicate that it wished to carve out any other systems from the comprehensive carriage agreement the parties were negotiating.) To address its concerns about the former Adelphia systems, Comcast proposed that it launch MASN within MASN's Television Territory in phases. First, Comcast would launch MASN on cable systems serving [redacted] subscribers in Regions 1 and 2 (as delineated in the Term Sheet) and a portion of Region 4 by September 1, 2006. Second, Comcast would launch [redacted] of the remaining [redacted] subscribers that it claimed it had in Regions 4 and 5 by April 1, 2007. Comcast represented orally, however, that it could not immediately commit to launching approximately [redacted] former Adelphia subscribers served by Roanoke, Lynchburg, and other Virginia systems.

On August 4, 2006, following additional negotiations between the parties, Comcast modified its proposal, proposing to launch the [redacted] remaining subscribers in Regions 4 and 5 in two phases: [redacted] subscribers would launch by April 1, 2007, and [redacted] subscribers would launch by April 1, 2008.[46] No mention was made during these discussions of exclusions of any Comcast systems other than the former Adelphia systems, which according to Comcast were subject to unique bandwidth constraints that precluded carriage of MASN as a technical matter.[47] Indeed, throughout the course of the negotiations between the parties, Comcast's representatives never specifically referred to any of their individual systems other than the

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[45] *See id.* ¶ 20; Wyche Test. ¶ 35.

[46] *See* Gluck Test. ¶ 20. Those [redacted] subscribers were different from the [redacted] subscribers for whom launch might be delayed until April 2008. *See id.* ¶¶ 20, 22.

[47] *See* Wyche Test. ¶¶ 35-36; Gluck Test. ¶ 24.

former Adelphia systems, and they never mentioned any specific area that posed problems for a launch other than the former Adelphia subscribers in Virginia.[48] Nor did they ever raise lack of demand or price as reasons why any Comcast system would not launch MASN.

On the afternoon of August 4 – three hours before the arbitration deadline was set to expire – Comcast transmitted to MASN a revised Term Sheet using the form MASN had provided on August 2, with changes in redline.[49] Comcast also provided for the first time a filled-in List of Systems.[50] The list consisted of two full pages naming systems in all five regions within MASN's Television Territory in which Comcast represented it had systems.[51] The list also provided the number of estimated subscribers for each system and was divided into two parts: those systems that would launch on September 1, 2006, and those that would launch by April 1, 2007, or April 1, 2008. Comcast gave no indication (either in the Term Sheet, the List of Systems, or orally) that it was excluding any of its cable systems within MASN's Television Territory other than the former Adelphia systems.[52] To the contrary, Comcast's email accompanying the Term Sheet stated that it [redacted][53] which confirmed MASN's understanding that the List of Systems was meant to memorialize the parties' agreement to carry MASN on "all Comcast systems" with the exception (for the time being) of the former Adelphia systems in Roanoke, Lynchburg, and other Virginia areas.

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[48] *See* Wyche Test. ¶¶ 36, 45; Gluck Test. ¶¶ 23-24.

[49] MASN Ex. 89, at 30-34.

[50] *Id.* at 40-41 ("Schedule A – List of Systems").

[51] *Id.*

[52] *See* Gluck Test. ¶¶ 23-24, 27.

[53] MASN Ex. 89, at 30; *see* Gluck Test. ¶ 26.

Although carriage on the former Adelphia systems was important to MASN, MASN agreed to Comcast's proposal not to include those systems on the contractually-agreed upon launch schedule based on Comcast's representation that it was not technically possible at that time for Comcast to carry MASN on its newly acquired Adelphia systems at that time.[54] Comcast at no point stated that it would never launch those systems when they were upgraded.[55] Nor did Comcast ever indicate that there was a lack of demand for MASN on those systems – to the contrary, its stated basis for excluding them was technical, that they had limited bandwidth.

After receiving the List of Systems from Comcast, MASN began to review it. MASN had only three hours to do so given the Commission's deadline, and the task was further compounded by the fact that there is no source – other than Comcast itself – that provides the names of Comcast systems and the subscribers served by each system. Comcast uses a proprietary protocol for naming its systems and does not publicly report subscriber totals for its individual systems. Thus, MASN was forced to take Comcast at its word that the List of Systems reflected the prior conversations and was meant to ensure that the former Adelphia systems (for the time being) would be the only group of systems omitted from the Term Sheet.[56]

With limited time and information, MASN worked to confirm that the List of Systems included all of Comcast's systems within MASN's Television Territory. As the Commission itself has recognized, however, that is no easy task.[57] Relying on data MASN has collected from public sources, MASN estimated that Comcast had approximately [redacted] subscribers

[54] *See* Gluck Test. ¶ 25.

[55] *See id.*

[56] *See id.* ¶¶ 27-28; *see also* Wyche Test. ¶¶ 39-40.

[57] *See, e.g.*, Ted Hearn, Multichannel News, *Wall Street Analyst Refutes FCC's Chairman's Cable Math* (Nov. 25, 2007) (MASN Ex. 11) (noting the controversy over FCC's cable subscribership numbers, which were inaccurate "because some cable operators withheld their subscriber and homes-passed totals").

within MASN's territory.[58] MASN did not try to determine the names of individual Comcast systems or the number of subscribers associated with each system, as doing so would be unproductive. A cable operator's internal descriptions of its cable systems – often referred to as "head-ends" – do not map to the territories used by Nielsen.[59]

Having determined from Nielsen that Comcast served approximately [redacted] subscribers within MASN's Television Territory, MASN compared this total to the total number of subscribers on the Comcast-provided List of Systems. Comcast's List of Systems contained a total of [redacted] subscribers. When the estimated [redacted] former Adelphia systems were added to this number, the total of [redacted] subscribers corresponded to MASN's internal estimates that Comcast had approximately [redacted] expanded basic subscribers within MASN's Television Territory.[60] Thus, based on this analysis, MASN believed that Comcast was including in its List of System all systems within MASN's Television Territory, except the former Adelphia systems.

Comcast at no time informed MASN that it had unilaterally and arbitrarily excluded systems serving some [redacted] additional subscribers from the List of Systems for a total of nearly [redacted] subscribers in the Unlaunched Systems, in such places as the Harrisburg and Tri-Cities DMAs, nor did Comcast ever raise those areas as places where it had any need or intention to exclude carriage.[61] If Comcast had requested such exclusions, MASN would have objected and it might well have pursued its arbitration remedy.

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[58] *See* Wyche Test. ¶ 40.

[59] *See id.* ¶ 39; *see also* Gluck Test. ¶¶ 31-32.

[60] *See* Wyche Test. ¶ 40; *see also* Gluck Test. ¶ 26.

[61] *See* Gluck Test. ¶ 28.

MASN and Comcast signed the Term Sheet on August 4, less than three hours after MASN received Comcast's List of Systems and less than a half-hour before the deadline to file for arbitration. In addition to setting forth terms of carriage, the Term Sheet settled and released MASN's pending carriage complaint and CSN-MA's suit in Maryland state court.

### E. Comcast's Discriminatory Refusal To Carry MASN on the Unlaunched Systems in 2007

Based on the negotiations and MASN's review of the List of Systems in the parties' agreement, MASN believed that the 2006 agreement with Comcast covered all of MASN's Television Territory except for the former Adelphia systems that the parties expressly excluded based on Comcast's representations regarding the current technical limitations of those systems.

In January 2007, however, four months after Comcast launched MASN on the first of Comcast's cable systems, MASN learned that Comcast did not intend to launch MASN on certain systems serving approximately [redacted] subscribers in the Harrisburg DMA.[62] MASN then initiated an effort to document the locations where Comcast had not launched MASN. That effort required extensive investigation into the names and locations of Comcast's systems and the numbers of subscribers on those systems. Comcast officials participated in those efforts, and the determination of Comcast's systems and number of subscribers would have been impossible without that assistance.[63] After more than a year, MASN uncovered the scope of the Unlaunched Systems: MASN has not been launched on systems encompassing nearly [redacted] subscribers in the Harrisburg, Roanoke, and Tri-Cities DMAs, and on other systems in Virginia and Pennsylvania in the Richmond-Petersburg, Charlottesville, Norfolk, Pittsburgh, and other

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[62] *See, e.g.*, MASN_COM003947 (MASN Ex. 213); MASN_COM005269; MASN_COM00005796 (MASN Ex. 119); MASN_COM00008107 (MASN Ex. 121). The evidence will show that MASN was "shocked" to learn of these exclusions. Deposition Transcript of James Cuddihy at 53 (Apr. 28, 2009) (MASN Ex. 77) ("Cuddihy Dep.").

[63] *See* Wyche Test. ¶¶ 42-43.

DMAs.[64] All told, these Unlaunched Systems serve approximately [redacted] of Comcast's subscribers within MASN's Television Territory (a total *greater* than the number of Comcast subscribers in the cities of Washington and Baltimore).

### F. MASN's Subsequent Efforts To Secure Carriage, MASN's Complaint, and the *Hearing Designation Order*

After uncovering the full scope of Comcast's refusal to carry MASN on the Unlaunched Systems, the parties reached a tolling agreement in the hope of reaching a negotiated agreement. MASN sought for more than a year to reach a negotiated carriage agreement with Comcast with respect to the Unlaunched Systems. After learning of the full scope of the coverage gaps in Comcast's footprint, MASN formally requested carriage in those areas. MASN explained that, because Comcast carried affiliated RSNs on the majority of these Unlaunched Systems and because MASN was comparably situated to those affiliated RSNs, Comcast was obliged to extend equal carriage terms to MASN. Comcast steadfastly refused to carry MASN on these systems, however, insisting that it had no obligation to do so under the Term Sheet and claiming (for the first time) that there was little demand for MASN in these areas.

Unable to reach agreement with Comcast, MASN filed a carriage complaint with the Commission on July 1, 2008, alleging that Comcast's discriminatory refusal to carry MASN on the Unlaunched Systems violated the Cable Act's and the Commission's non-discrimination rules. MASN included with its complaint exhibits and declarations setting forth its *prima facie* case of discrimination. Comcast answered MASN's complaint, attaching its own declarations and evidence. MASN filed a reply with supplemental declarations and additional evidence.

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[64] *See generally* Expert Report of Jonathan Orzsag, Attach. 4 (MASN Ex. 70) ("Orszag Report").

On October 10, 2008, the Media Bureau issued a *Hearing Designation Order*. The Media Bureau concluded that MASN had established a *prima facie* case of discrimination, rejecting Comcast's contract-based, res judicata, and statute-of-limitations defenses, and designating certain issues to this Tribunal for resolution.[65]

## ARGUMENT

## I. MASN'S THEORY OF THE CASE AND ESSENTIAL FACTS TO BE PROVEN

### A. The Legal Framework

#### 1. Congress Has Prohibited Affiliation-Based Discrimination by Vertically Integrated Cable Companies

This case is about Comcast's abuse of its market power as a vertically integrated cable operator. Generally, a cable operator has discretion regarding which programming networks to carry. If and when a cable operator chooses to integrate vertically into the programming market – by purchasing its own programming networks (as Comcast has done) – it assumes non-discrimination obligations that confine that discretion. The reason for that is simple: vertical integration creates powerful incentives for cable operators to favor the interests of their affiliated networks to the detriment of unaffiliated networks. Such integration, Congress has said, "gives cable operators the incentive and ability to favor their affiliated programming services" by, among other things, unreasonably "refus[ing] to carry other programmers."[66]

In enacting the 1992 Cable Act, Congress elected not to forbid vertical integration outright but instead to impose non-discrimination obligations on such cable companies to protect unaffiliated programmers and the public from the consequences of discrimination. Congress

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[65] *See HDO* ¶ 90 (explaining that MASN's allegations and evidence established a *prima facie* case); *id.* ¶¶ 102-105 (rejecting Comcast's statute-of-limitations defense and argument that MASN's claims were barred by the contract); *id.* ¶¶ 106-107 (rejecting Comcast's res judicata defense).

[66] S. Rep. No. 102-92, at 25, 1992 U.S.C.C.A.N. at 1158.

directed the Commission to adopt rules prohibiting "discriminat[ion] . . . on the basis of affiliation or non-affiliation."[67] The Commission has implemented rules reflecting that prohibition.[68] Those rules are at issue here.

### 2. The *Adelphia Order*

In addition to those non-discrimination obligations, the *Adelphia Order* provides an important legal backdrop to this proceeding. In that order, as explained above, the Commission concluded that Comcast's acquisition of Adelphia's assets and its swap of assets with TWC would "consolidate" Comcast's "regional footprints" in, among other places, "Pennsylvania" and parts of "Virginia."[69] That consolidation, in turn, would increase Comcast's "incentive and ability" to discriminate against unaffiliated RSNs, such as MASN.[70] The Commission also concluded that "the programming provided by RSNs is unique because it is particularly desirable and cannot be duplicated."[71] Given the value of RSN programming, Comcast has an "incentive to deny carriage to rival unaffiliated RSNs with the intent of forcing the RSNs out of business *or* discouraging potential rivals from entering the market, thereby allowing Comcast . . . to obtain the valuable programming for its affiliated RSNs."[72] To "prevent such behavior," the Commission ordered that Comcast submit itself to final-offer arbitration, a remedy that the Commission suspended in a matter unrelated to MASN.[73]

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[67] 47 U.S.C. § 536(a).

[68] *See* 47 C.F.R. § 76.1301(c).

[69] *Adelphia Order* ¶ 7.

[70] *Id.* ¶¶ 116, 189.

[71] *Id.* ¶ 189 (emphasis added).

[72] *Id.*

[73] *Id.*

### 3. The Media Bureau's Framework

A third piece of the relevant legal framework comes from an order of the Media Bureau, affirming findings of discrimination by another vertically integrated cable company. In that order, the Media Bureau, acting on delegated authority and in an order that is binding on this Tribunal,[74] endorsed a burden-shifting framework for implementing the program-carriage non-discrimination mandate.[75] Under this framework, MASN must prove that it is similarly situated to Comcast's affiliated RSNs, that Comcast has treated MASN differently from those affiliated RSNs, and that the relevant difference in treatment cannot be explained by a legitimate business justification.[76] The ultimate legal standard for interpreting the Cable Act's and the Commission's non-discrimination mandate, however, is of little consequence: whatever standard this Tribunal employs, the evidence is overwhelming that (1) Comcast has engaged in affiliation-based discrimination and (2) it lacks a legitimate business justification for its conduct.

## B. Comcast's Carriage Decisions Represent Affiliation-Based Discrimination

### 1. MASN Is Similarly Situated to Comcast's Affiliated RSNs

The evidence will establish that MASN is similarly situated to CSN-MA and CSN-Philly. Both MASN and Comcast's affiliated networks are regional sports networks; both showcase professional sports programming for which there is strong consumer demand; both operate in largely overlapping geographic territories; and both compete head-to-head.[77]

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[74] *See* 47 U.S.C. § 155(c).

[75] *See generally* Order on Review, *TCR Sports Broadcasting Holding, L.L.P. v. Time Warner Cable Inc.*, 23 FCC Rcd 15783, ¶¶ 21-25 (2008) (MASN Ex. 222) ("*TWC Order*").

[76] *See TWC Order* ¶¶ 21-22; *HDO* ¶¶ 108-110.

[77] *See TWC Order* ¶¶ 28-29; Cuddihy Test. ¶¶ 6-9; Deposition Transcript of Hal Singer at 69 (Apr. 30, 2009) (MASN Ex. 78) ("Singer Dep.") (from an economic perspective, networks are similarly situated if "they compete for the same type of programming"). The standard for this element of MASN's case is not strict. *See generally* Memorandum Opinion and Order on Reconsideration, *Southwestern Bell Telephone Co.*, 13 FCC Rcd 6964, ¶¶ 4, 12 (1998)

MASN is an RSN that provides live programming of major professional sports teams (the Orioles and Nationals) in the Mid-Atlantic region.[78] Comcast's affiliated RSNs also telecast major professional sports programming (the Wizards, Capitals, Phillies, and Flyers) throughout Comcast's footprint in accord with league-imposed restrictions, just as MASN does.[79] Comcast, moreover, has previously carried the Orioles on CSN-MA, and it tried to obtain the rights to both the Orioles and the Nationals for CSN-MA at the time MASN was preparing to launch as a full-time programming network – illustrating concretely the similar nature of these networks.[80] Both MASN and Comcast's RSNs also complement their line-ups of major professional sports with extensive college sports programming.[81]

These facts are largely not in dispute. "Comcast admits," for example, "that CSN-Philadelphia telecasts the games of major professional sports teams,"[82] just as MASN does. Comcast "admits that CSN-MA telecasts the games of major professional sports teams."[83] Furthermore, "Comcast admits that it has attributable ownership interests in CSN-Philadelphia and CSN-MA."[84] In addition, "Comcast admits that CSN-Philadelphia has the rights to televise

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(reaffirming order rejecting tariff proposal under which to be "similarly situated" a customer would need to be "nearly identical" to another, reasoning that a "narrow[]" definition would "effectively preclude[]" a customer from qualifying); *Rodgers v. U.S. Bank, N.A.*, 417 F.3d 845, 852 (8th Cir. 2005) ("At the prima facie stage . . . , we choose to follow the low-threshold standard for determining whether [parties] are similarly situated.").

[78] *See* Compl. ¶¶ 3, 18; Written Direct Testimony of Hal J. Singer, Ph.D. ¶ 31 (Attach. C to Prehearing Submission) ("Singer Test.").

[79] *See* Compl. ¶¶ 64-65, 73-74.

[80] *See infra* pp. 47-48.

[81] *See, e.g.*, Cuddihy Test. ¶ 23.

[82] Answer at 47, ¶ 64.

[83] *Id.* ¶ 65.

[84] *Id.* at 48, ¶ 67.

certain Philadelphia Flyers (NHL) and Philadelphia 76ers (NBA) games" and that an affiliate "owns the Philadelphia Flyers and Philadelphia 76ers."[85]

More fundamentally, the conclusion that MASN and Comcast's RSNs are similarly situated is confirmed by the fact that MASN and Comcast's affiliated RSNs compete in the marketplace for viewers, sports fans, advertising dollars, and access to sports programming rights.[86] The evidence is abundant on this point. Comcast's internal documents reveal, for example, that Comcast has long recognized that its carriage of MASN would set the stage for intense [redacted].[87]

The evidence also shows that Comcast's distribution arm and its employees tasked with running the company's RSNs continued to conspire against MASN even *after* the August 2006 Term Sheet. In 2007, [redacted] Other evidence will drive home the fact that Comcast understands the competition between MASN and its affiliated RSNs

[85] *Id.* ¶ 74.

[86] *See* Compl. ¶¶ 60, 73-74; *see also* Singer Dep. at 73 (CSN-Philly and MASN are similarly situated because "they are both offering professional baseball games in the same geographic markets"); *id.* at 84; Singer Test. ¶¶ 92-98.

[87] *See* COMMASN_00008455-57 (MASN Ex. 115) [redacted]; *see also* COMMASN_00000150 (MASN Ex. 98) [redacted]; MASN_COM00005867 (MASN Ex. 124) [redacted]

[88] COMMASN_00008207 (emphasis added) (MASN Ex. 128).

and that Comcast (because of its vertically integrated status) views MASN as a competitor rather than as a business partner.[89]

### 2. Comcast Has Treated MASN Differently from Its Affiliated RSNs

The evidence will also demonstrate that Comcast treats MASN differently from (and worse than) its affiliated RSNs and that this difference in treatment is driven by considerations of affiliation and non-affiliation. Multiple layers of evidence – considered independently and in total – support this conclusion.

*First*, the evidence will show that, for all but a tiny handful of the cable systems that make up the Unlaunched Systems, Comcast carries at least one of its affiliated RSNs (either CSN-Philly and/or CSN-MA) but refuses to carry MASN on the same systems.[90]

*Second*, of all the cable systems in the geographic areas covered by MASN, CSN-MA, and CSN-Philly, [redacted].[91] By contrast, Comcast has refused to carry MASN on systems representing approximately [redacted] subscribers – a number greater than the number of Comcast subscribers in the cities of Washington and Baltimore *combined*.[92] Comcast's own data show that Comcast carries its affiliated RSNs on systems reaching more than [redacted] of potential subscribers, whereas it distributes MASN on systems reaching only [redacted] of potential subscribers. The evidence demonstrates, moreover, that Comcast's affiliated RSNs are carried by Comcast

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[89] *See* COMMASN_00002740 (MASN Ex. 122) [redacted] (emphasis added).

[90] *See* Compl. ¶ 71.

[91] *See* Orszag Report, Attach. 4; Deposition Transcript of Michael Ortman at 69 (May 4, 2009) (MASN Ex. 79) ("Ortman Dep.").

[92] *See* Orszag Report, Attach. 4 [redacted].

systems serving more than [redacted] million subscribers in the Mid-Atlantic and surrounding regions; MASN, by contrast, is carried on Comcast systems serving only [redacted] million subscribers.

*Third*, the evidence will establish that Comcast is the poster child for Congress's concerns about the anti-competitive and anti-consumer incentives produced by vertical integration. Comcast understands the substantial benefits that flow from vertical integration, particularly with respect to sports programming. The evidence will show that Comcast goes to great lengths to establish ownership interests in RSNs wherever it operates cable systems.[93] Why has Comcast deemed it important to own and operate RSNs and to push out of the way RSNs that are unaffiliated? The evidence will reveal that Comcast's objective is to use its equity stake in RSNs as weapons against competing MVPDs – [redacted]

Similarly, the evidence will establish that, as part of Comcast's effort to use RSNs as a competitive weapon, Comcast systematically favors the interests of its affiliated RSNs at the expense of unaffiliated RSNs. Internal Comcast documents establish, for example, that Comcast determined [redacted]

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[93] *See* COMMASN_00010153-54 (MASN Ex. 141), COMMASN_00006637-38 (MASN Ex. 142) [redacted]; COMMASN_00010383 (MASN Ex. 137) [redacted]; COMMASN_00010306 (MASN Ex. 136) [redacted]; COMMASN_00010398 (MASN Ex. 137).

[94] *See* COMMASN_00007476 (MASN Ex. 135) [redacted]

[redacted][95] In order for that strategy to succeed, however, "[redacted]

[redacted][96] Unaffiliated RSNs, therefore, must be marginalized, lest they become threats to Comcast RSNs' [redacted]

Indeed, Comcast's use of affiliated RSNs as a [redacted] against rising sports costs is effectively a tool of structural discrimination against unaffiliated RSNs. Internal Comcast documents establish that, when Comcast has an ownership interest in an RSN, Comcast [redacted][97] For example, [redacted][98] The result of use of this [redacted] calculation is to give Comcast's affiliates a considerable advantage in reaching carriage deals with Comcast: in competing for a single carriage slot, for example, an unaffiliated RSN otherwise comparably situated to an affiliate not only must be *equal* to the affiliate, but also must offer a much lower rate than the rate Comcast's affiliated RSN nominally charges. This is *per se* discrimination: it is no different from an employer requiring one race of job candidates to score 20% higher on a test to be considered equivalent to another race of job candidates. No one would doubt that application of such a disparate standard constitutes race-based discrimination:

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[95] COMMASN_00010312 (emphasis added) (MASN Ex. 136).

[96] *Id.* at. 00010315 (emphasis added).

[97] *See id.* at 00010314.

[98] *See* COMMASN_00007214 (MASN Ex. 92).

there should be no doubt that Comcast's [redacted] calculations are affiliation-based discrimination.

*Fourth*, despite Comcast's naked assertion that an "arms length relationship" exists between Comcast and its affiliated RSNs,[99] the evidence establishes there is no meaningful distinction between Comcast's distribution and programming arms. Comcast perceives the economic interests of Comcast and its RSNs to be same: what is bad for Comcast's RSNs is bad for Comcast, and vice versa.[100] The evidence will conclusively demonstrate close coordination between Comcast and its affiliated RSNs, including to counter the competitive threat posed by MASN and the sharing of confidential information regarding MASN between Comcast's distribution arm and its programming arm.[101] As further evidence of preferential treatment, Comcast forces unaffiliated networks [redacted] [102] In addition, Comcast is constantly looking to integrate more fully its distribution arm and its RSNs by, among other things, [redacted]

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[99] *See, e.g.*, Deposition Transcript of Madison Bond at 40 (Apr. 10, 2009) (MASN Ex. 72) ("Bond Dep.").

[100] *See* COMMASN_00008463-64 (MASN Ex. 69) [redacted]

[101] *See, e.g.*, COMMASN_00000150 (MASN Ex. 98) [redacted]

[102] *See infra* p. 34.

[redacted][103]

*Fifth*, documents surrounding the "negotiations" that led to a Term Sheet between MASN and Comcast in August 2006 put beyond question that Comcast's carriage decisions are motivated by affiliation. On the eve of a deal between MASN and Comcast, the highest level of Comcast's decision-makers [redacted][104] A few days later, Comcast's negotiators expressed to other Comcast employees a desire to [redacted] chunks of MASN's territory in an effort to keep MASN's [redacted][105] A cable operator without affiliated assets to protect would never engage in such behavior and it cannot be explained by any legitimate business justification; it is effectively direct evidence that Comcast looks to protect its affiliated RSNs in carriage decisions.

*Sixth*, the evidence is overwhelming that Comcast applies inconsistent carriage standards to affiliated and unaffiliated RSNs and it regularly favors the interests of its affiliates in myriad

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[103] COMMASN_00010318 (MASN Ex. 136); *see also* COMMASN_00006615 (MASN Ex. 134) [redacted]

[104] *See, e.g.*, COMMASN_00000122 (MASN Ex. 102) [redacted]; COMMASN_00000096 (MASN Ex. 103) ([redacted]

[105] COMMASN_00000301 (MASN Ex. 104).

ways. Such disparate treatment supports an inference of intentional discrimination.[106] The Media Bureau has held as much.[107] The evidence of such preferential treatment is abundant here, and includes, but is not limited to:

- Comcast's affiliated RSNs reach more than [redacted] of all potential Comcast subscribers, whereas MASN reaches only [redacted];[108]
- [redacted][109]
- Comcast's distribution arm and programming networks are heavily integrated, [redacted][110]
- Comcast has suggested that MASN should be launched only when there is [redacted] to do so, a standard not applied to affiliated RSNs;[111]
- [redacted];[112] and
- Comcast uses [redacted] to give a systematic and inherently discriminatory advantage to affiliated RSNs.[113]

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[106] *See Vance v. Young*, No. 2:05cv00316-WRN, 2007 WL 1975604, at *3 (E.D. Ark. July 6, 2007) ("Plaintiff shows that he was treated unequally when Young disregarded numerous, serious infractions of Coach Barnes, while holding Plaintiff strictly accountable. The best circumstantial evidence of discriminatory intent is in making such comparisons. From this evidence, a reasonable juror could infer that Young intentionally held Plaintiff to a higher standard than Coach Barnes. So, Plaintiff offered enough evidence of discriminatory intent as a motivating factor in his termination.").

[107] *TWC Order* ¶ 33 (TWC engaged in affiliation-based discrimination in not applying the same ratings requirements to affiliated and unaffiliated RSNs, explaining that the Commission's rules "prohibit[ ] TWC from applying to unaffiliated programming services more stringent standards . . . than those it applied to affiliates").

[108] *See* Orszag Report, Attach. 4.

[109] *See, e.g.*, Bond Dep. at 66; *id.* at 195 [redacted]

[110] *See, e.g., supra* p. 32.

[111] *See* COMMASN_00000328 (MASN Ex. 106).

[112] *See* Bond Dep. at 57, 62-64.

*Seventh*, the conclusion that Comcast's carriage decisions were influenced by prohibited factors is supported by testimony of Comcast's lead negotiator that he has no idea what conduct the Commission's non-discrimination rules allow and forbid. [redacted][114] [redacted] Given the hydraulic pressure to favor the interests of affiliates (over the interests of unaffiliated networks) created by vertical integration and the close-nit (and special) relationship between Comcast and its affiliated RSNs, and in light of Mr. Bond's concession that [redacted], it is simply implausible to conclude that considerations of affiliation and non-affiliation did not motivate Comcast's carriage decisions. Indeed, the Media Bureau has recognized that a similar failure of a cable operator to take seriously the Commission's rules supports a finding of discrimination.[116]

*Eighth*, Comcast's numerous past acts of discrimination and conduct evincing bias against MASN support an inference that the carriage decisions at issue have discriminatory purpose and effect.[117] The evidence will show that, since MLB's decision to award Nationals

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[113] *See supra* pp. 31-32.

[114] [redacted] *see* [redacted]

[115] [redacted]

[116] *See TWC Order* ¶ 32 n.127 ("TWC's failure to educate its employees about the company's specific regulatory obligations is a serious dereliction of TWC's responsibilities under the program carriage" rules).

[117] *See Fortier v. Ameritech Mobile Communications, Inc.*, 161 F.3d 1106, 1112 (7th Cir. 1998) ("In other contexts, there most certainly will be circumstances in which evidence surrounding a previous employment decision such as a demotion would be relevant to and probative of an employer's intent in a subsequent termination decision."); *Little v. National Broad. Co.*, 210 F. Supp. 2d 330, 379 (S.D.N.Y. 2002) (evidence of past conduct, "even if it

rights to MASN (not Comcast), Comcast has engaged in a campaign to undermine MASN, including bringing baseless litigation in state court, sending letters to other MVPDs warning them not to deal with MASN, and, after reaching an initial carriage agreement with MASN, sending letters to all Comcast subscribers singling out MASN for a rate increase.[118] Indeed, on the latter point, Comcast's witness [redacted] Comcast also has *no* explanation for its failure even to negotiate with MASN for more than 16 months after MASN's formation (despite the fact that MASN carried programming that Comcast had fought hard to obtain for the Comcast family). The evidence will show that Comcast harbors irrational animosity against the owner of the Orioles, animosity that intensifies Comcast's discriminatory animus against MASN.[120]

*Ninth*, the decisions of other major *non*-vertically integrated MVPDs to carry MASN in the disputed regions are strong evidence that Comcast's contrary decisions are influenced by affiliation. Across Comcast's footprint, and in the specific areas corresponding to the Unlaunched Systems, Comcast's primary competitors are DirecTV and Dish.[121] But DirecTV and Dish carry MASN in areas corresponding to the Unlaunched Systems on the *same* terms and conditions that MASN has proposed to Comcast. The crucial difference between Comcast's

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occurred well before the statute of limitations, may support an inference of racially discriminatory intent").

[118] *See infra* pp. 12-14 (recounting Comcast's discriminatory campaign). Comcast's own witness stated in a deposition that he would be surprised to learn Comcast engaged in sending letter to other MVPDs, stating that [redacted] Ortman Dep. at 139.

[119] *See* [redacted]

[120] *See, e.g.*, Bond Dep. at 101.

[121] *See* Singer Test. ¶ 32.

competitors and Comcast, however, is that DirecTV and Dish lack the incentive to protect the interests of affiliated RSNs because they are not vertically integrated.

* * *

In sum, the evidence will show that Comcast has treated MASN disparately from its affiliated RSNs and that this difference in treatment is part of a pattern and practice of structural discrimination by Comcast against unaffiliated RSNs – discrimination that has manifested itself once again in Comcast's failure to carry MASN on the Unlaunched Systems.[122]

## C. Comcast Has No Legitimate, Non-Discriminatory Justification for Its Differential Treatment

The evidence will also establish that Comcast has no legitimate, non-discriminatory business justification for its campaign of discrimination against MASN. Under the Media Bureau's standard, of course, Comcast bears the burden of justifying its disparate treatment of MASN. But MASN prevails regardless of which party bears the burden on this issue.

### 1. Comcast's Contract-Based Defense Is Unfounded

Comcast's principal defense of its discriminatory refusal to carry MASN on the Unlaunched Systems is that the Term Sheet – both because it gives "discretion" to Comcast with respect to systems not listed on Schedule A and because it contains a release clause – sanctions Comcast's later discriminatory carriage decisions. This defense is particularly disingenuous in light of the fact that Comcast does not [redacted]

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[122] This evidence of discrimination is sufficient to establish affiliation-based discrimination under any legal standard. Circumstantial evidence is more than sufficient to support an inference of discrimination. *See Amrhein v. Health Care Serv. Corp.*, 546 F.3d 854, 858-59 (7th Cir. 2008) ("Because direct evidence of discriminatory intent is rare, a plaintiff can also offer circumstantial evidence, which allows the trier of fact to *infer* intentional discrimination by the decisionmaker, typically through a longer chain of inferences.") (internal quotation marks and alterations omitted).

[123] *See supra* p. 34.

Thus, the mere act of requiring MASN to obtain a contractual carriage agreement is discriminatory. In any event, Comcast's contract-based defense is wrong.

*First*, the Media Bureau has squarely rejected it. The Bureau held that, although "the Term Sheet committed Comcast's future carriage decisions, including carriage on systems not included in the List of Systems, to Comcast's 'discretion,'" "[t]he Term Sheet does *not indicate that MASN waived its statutory program carriage rights with respect to Comcast's exercise of discretion*."[124] The meaning of the Term Sheet is thus irrelevant: the question is whether Comcast's post-agreement conduct reflects discretion in a manner that violates federal non-discrimination rules. "Whether or not Comcast" has a right "pursuant to a private agreement is *not relevant* to the issue of whether" exercising a right in certain circumstances (for example, for discriminatory purposes) would "violate[] . . . the Act and the program carriage rules."[125] "Parties to a contract," the Bureau has said, "cannot insulate themselves from enforcement of the Act or our rules by agreeing to acts that violate the Act or rules."[126] That holding is both binding and persuasive, as this Tribunal has recognized,[127] and it forecloses Comcast's reliance on the Term Sheet as a defense to its discriminatory carriage decisions here.

*Second*, regardless of whether the Bureau's analysis is binding, it is correct. The Term Sheet commits certain carriage decisions to Comcast's "discretion." That in no way supports the theory that the parties intended to give Comcast a permanent exemption from federal law and the

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[124] *HDO* ¶ 105 (emphasis added).

[125] *Id.* ¶ 72 (emphasis added).

[126] *Id.*

[127] *See* Memorandum Opinion and Order, *NFL Enterprises LLC v. Comcast Cable Communications, LLC*, MB Docket No. 08-214, File No. CSR-7876-P, ¶ 3 (FCC 09M-36 Apr. 17, 2009).

right to make discriminatory (and, hence, *unlawful*) carriage decisions.[128] Indeed, Comcast's principal negotiator has acknowledged that the clause does not unambiguously provide Comcast a right to make discriminatory decisions.[129] Such a reading would, in any event, run contrary to settled principles of law.[130]

*Third*, these contract-based defenses fail because the exclusion of the Unlaunched Systems from the Term Sheet is the result of Comcast withholding key information from MASN and making misrepresentations during the course of negotiations. Comcast's conduct should not be rewarded by allowing the Term Sheet to serve as a shield for subsequent misconduct. The evidence will show that, throughout the parties' negotiations, they *never* discussed the possibility that MASN would not be launched on Harrisburg systems or non-Adelphia Virginia systems, as Comcast's principal negotiator, Mr. Bond, conceded.[131] The only systems discussed were former Adelphia systems in the Roanoke, Lynchburg, and other unspecified Virginia areas.[132] MASN's understanding of the deal was confirmed when Comcast transmitted what ultimately became the Term Sheet, representing that the draft [redacted][133]

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[128] *See, e.g.*, Deposition Transcript of David Gluck at 76-77 (Apr. 15, 2009) (MASN Ex. 74) ("Gluck Dep."); Deposition Transcript of Michael Wyche at 114-15 (Apr. 16, 2009) (MASN Ex. 75) ("Wyche Dep.").

[129] *See* Bond Dep. at 414.

[130] *See, e.g.*, *Richardson v. Sugg*, 448 F.3d 1046, 1054 (8th Cir. 2006) (explaining that "[a] number of other circuits have . . . held . . . that persons may not contract away *prospective claims* under Title VII" and reasoning that allowing a private party "to bargain away the right to pursue a prospective discrimination claim [would] frustrate[ ] t[he] statutory scheme" designed by Congress to remedy discrimination) (emphasis added).

[131] *See generally supra* pp. 16-22 (discussing Comcast's bad-faith exclusion of the non-Adelphia Unlaunched Systems from the Term Sheet).

[132] *See* Gluck Test. ¶¶ 22-28; Wyche Test. ¶ 45.

[133] *See* Gluck Test. ¶¶ 24-26; Wyche Test. ¶ 37.

Of course, at least some of Comcast's negotiating team knew that representation was false – someone must have known that large systems in the Harrisburg and southwestern Virginia DMAs were being omitted from the List of Systems despite the fact that Comcast never mentioned the exclusions to MASN.[134] While evading numerous questions designed to determine the date on which he knew that Harrisburg and other unlaunched systems were not being launched, Comcast's *lead* negotiator has admitted that he himself did not learn for certain of the exclusions until April 2007 when MASN representatives met with him to discuss Comcast's failure to launch those systems.[135] The evidence will establish that the exclusion of these systems from the Term Sheet was the result, at best, of a reckless disregard for MASN's interests and, at worst, misrepresentation of a material fact.

Comcast argues that MASN knew or should have known of the exclusion of the non-Adelphia Unlaunched Systems.[136] The evidence belies that contention. MASN's documents show that MASN has always understood the deal to encompass the full extent of MASN's Television Territory.[137] MASN's internal documents also support the conclusion that MASN did not know how Comcast's system names map onto geographic areas.[138] The testimony will establish further that, especially in the tight time frame caused by the arbitration deadline,

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[134] *See, e.g.,* [redacted] Wyche Dep. at 65.

[135] *See, e.g.*, Bond Dep. at 360.

[136] *See* Answer at 12, 15-17, ¶¶ 23, 27-28.

[137] *See, e.g.*, MASN_COM00006739 (MASN Ex. 123); MASN_COM001617 (MASN Ex. 63) [redacted] (MASN Ex. 212)

[138] *See* MASN_COM003459 (MASN Ex. 126) (email documenting MASN's efforts to map Comcast's systems).

MASN had no reliable means of independently verifying that Comcast meant what it said: that the List of Systems on Schedule A reflected only the exclusion of certain former Adelphia systems (and only then because of current technical constraints).[139]

*Fourth*, the release clause of the Term Sheet is no defense to Comcast's discriminatory conduct. That clause applies to conduct "until the date of this Release clause" – that is, August 2006. MASN's Complaint concerns Comcast's refusal to carry MASN on Unlaunched Systems *after* MASN discovered it was not being carried on those systems in January 2007, well after the date of the release clause. A reading of the release clause that applies prospectively after August 2006 would grant Comcast impunity to violate the Commission's rules going forward. Foundational principles of contract interpretation and public policy foreclose such a reading: release clauses are to be interpreted narrowly;[140] exculpatory clauses in agreements bound up with the public interest (such as carriage contracts) are generally not enforced;[141] and contractual provisions that purport to exempt a party from ongoing statutory obligations are unenforceable except under circumstances not present here.[142]

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[139] *See* Gluck Test. ¶¶ 28, 30-32; Wyche Test. ¶¶ 39, 44; Gluck Dep. at 108.

[140] *See* 8 Richard A. Lord, *Williston on Contracts* § 19:21, at 278 (4th ed. 1998) (contractual provisions "limiting future liability are strictly construed by the courts"); *Rogers v. General Elec. Co.*, 781 F.2d 452, 454 (5th Cir. 1986) (collecting cases for the view that "an employee may validly release only those Title VII claims arising from discriminatory acts or practices which antedate the execution of the release" and that "an otherwise valid release that waives prospective Title VII rights is invalid as violative of public policy") (internal quotation marks omitted); Report and Order and Further Notice of Proposed Rulemaking, *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd 20235, ¶ 55 (2007) (this Commission has "wide authority" to prohibit enforcement of private agreements "where . . . the public interest so requires").

[141] *See Williston on Contracts* § 19:22, at 287 ("[b]ecause certain agreements are affected with a public interest, exculpation clauses contained in them are not enforceable").

[142] *Id.* § 19:25, at 316 ("[a] purported exemption from statutory liability is usually void, unless the purpose of the statute is merely to give an added remedy which is not based on any

### 2. Comcast's Demand Defense Lacks Merit

Comcast has also defended its refusal to carry MASN on the Unlaunched Systems on the ground that "there is very little consumer interest in MASN" in those areas.[143] But, as evidence developed in this proceeding will show, Comcast never considered demand in refusing to carry MASN; Comcast's claims of low demand are instead a pretext that Comcast developed as a defense to this litigation. Comcast's claims of low demand for MASN also are factually unsupportable – there is considerable (actual and potential) demand for MASN in the Unlaunched Systems, both in absolute terms and, more importantly, as compared to demand for Comcast's competing RSNs that Comcast has chosen to carry.[144]

#### a. Comcast's Demand Defense Is *Post Hoc* and Pretextual

Comcast's demand defense fails first and foremost because it is pretextual. The evidence will show that the only reason Comcast gave for any refusal to carry MASN in 2006 was a supposed technical concern with respect to the newly acquired Adelphia systems: Comcast never said anything about low demand for MASN at that time.[145] The evidence also shows that Comcast did not undertake any meaningful effort to study demand for MASN with respect to the

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strong policy") (footnotes omitted). For similar reasons, Comcast's res judicata defense is unpersuasive, as the Bureau has conclusively held. *See HDO* ¶¶ 106-107.

[143] Answer at 26, ¶ 45.

[144] The Media Bureau has made clear that potential demand is an important consideration, otherwise cable operators' discriminatory carriage decisions take on a self-fulfilling nature. *See TWC Order* ¶ 35 ("[I]t is unreasonable for TWC to foreclose broad carriage of MASN – and the opportunity to grow its fan base – and then rely on a lack of fan interest as a basis for its conduct. As MASN points out, such circular reasoning would almost always justify an MVPD's decision to deny carriage to new sports programming network.") Cuddihy Test. ¶ 25. Comcast's failure to assess potential demand for MASN – instead applying an [redacted] test (the opposite of potential demand), *see* COMMASN_00000328 – is thus independent evidence of discrimination. *See TWC Order* ¶ 32 n.127 (finding it significant that there was a "dearth of evidence" showing investigation of "potential demand").

[145] *See* Gluck Test. ¶ 9; [redacted]

Unlaunched Systems until 2007 or 2008. Although Comcast now purports to rely on expert testimony (testimony that is deeply flawed in its own right and that rests on benchmarks that Comcast *never* applies to its affiliated RSNs), Comcast's reliance on *post hoc* justifications is evidence of discrimination, not a defense to discrimination.[146]

### b. Demand for MASN Is Comparable to Demand for Comcast's RSNs

Setting aside the pretextual nature of Comcast's defense, Comcast's defense asks and answers the wrong question: *comparative* rather than *absolute* demand is the proper benchmark in a discrimination case. The issue in attempting to explain disparate treatment is whether demand for MASN's programming is comparable to demand for Comcast's affiliated programming. Comcast asserts, for example, that there is "no demand" for MASN "on the periphery of MASN's territory."[147] But Comcast itself carries CSN-MA on those *same* cable systems, and CSN-MA's core sports programming is *also* based in the Washington DMA. Such a double-standard strikes at the heart of a non-discrimination principle: if Comcast wants to adopt a policy of not carrying RSNs "on the periphery" of their territories, it may do so; what Comcast may not do is apply that standard selectively between affiliated and unaffiliated RSNs.[148]

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[146] *See EEOC v. Sears Roebuck & Co.*, 243 F.3d 846, 853 (4th Cir. 2001) ("a factfinder could infer from the late appearance of Sears's current justification that it is a post-hoc rationale, not a legitimate explanation for Sears's decision not to hire [the plaintiff]"); *Jaramillo v. Colorado Judicial Dep't*, 427 F.3d 1303, 1311 (10th Cir. 2005) ("The timing of the change [in explanation for challenged conduct] has been found to support the inference of pretext when it occurs after significant legal proceedings have occurred."); *Culver v. Gorman & Co.*, 416 F.3d 540, 549 (7th Cir. 2005) (explanation that "comes . . . late in the day" "permit[s] an inference of pretext").

[147] Declaration of Michael Ortman ¶ 8 (July 30, 2008) (Answer, Ex. C) ("Ortman Decl.").

[148] *See TWC Order* ¶ 33 ("The[ ] program carriage provisions thus prohibited TWC from applying to unaffiliated programming services more stringent standards . . . than those it applied to affiliates.").

The reason that Comcast has chosen to focus on absolute rather than comparative demand is clear: MASN's ratings on the Unlaunched Systems would be comparable to those of Comcast's affiliated RSNs. Orioles telecasts garnered strong ratings when previously carried by CSN-MA. This was the last time that Orioles telecasts enjoyed close to full penetration on the Unlaunched Systems and so offers the best guide to expected ratings once MASN enjoys carriage on Comcast's systems. For instance, in July 2004, the Orioles achieved an average of a [redacted] per game on CSN-MA in the Harrisburg DMA.[149] During that same period of July 2004, Orioles games achieved a [redacted] in the Roanoke-Lynchburg DMA. Even where Orioles games enjoyed less than full penetration on Comcast's cable systems, ratings have remained strong. In July 2005, Orioles games achieved a [redacted] in the Harrisburg DMA in July 2005 *after* CSN-MA had been dropped in Harrisburg itself.[150] All of these ratings prove significant interest in Orioles games and easily refute any claim to the contrary.

Since 2007, when MASN began producing and telecasting Orioles games itself, ratings have continued to be strong. In May 2007, Orioles games averaged a [redacted] in the Harrisburg DMA, and did so without full penetration on Comcast's market-dominating cable systems.[151] This was actually *higher* than the [redacted] for games during that same period in Washington, where Comcast carries MASN on all of its systems.[152] This refutes Comcast's claim that carriage of MASN is justified only in the "core" areas of Washington and Baltimore.

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[149] *See* MASN_COM008239-46 (MASN Ex. 83).

[150] *See id. See generally* Cuddihy Dep. at 16 (discussing ratings).

[151] *See* MASN_COM008196 (MASN Ex. 87).

[152] *See id.*

### c. Demand for MASN Is Strong in Absolute Terms

Even when evaluating demand for MASN in absolute terms, Comcast's demand defense cannot be squared with the evidence. The implausibility of Comcast's defense independently compels an inference of discrimination.[153]

*First*, decisions of other major MVPDs to carry MASN in areas corresponding to the Unlaunched Systems refute Comcast's defense.[154] The evidence will show that 22 other MVPDs have now agreed to carry MASN across MASN's Television Territory, including major MVPDs in Pennsylvania and Virginia.[155] As Dr. Singer has explained, "nearly every other significant MVPD in the contested areas, including Comcast's in-region competitors DIRECTV and Dish Network, *voluntarily choose to carry MASN on their most-penetrated tiers at the same rates offered to Comcast.*"[156] Those decisions demonstrate demand for MASN's programming in the contested areas and provide evidence that Comcast's exclusion is based on MASN's rivalry with Comcast's affiliated RSNs.[157] Indeed, the evidence will show that [redacted] made a specific inquiry with MASN to confirm the availability of MASN's programming in the Harrisburg

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[153] The Supreme Court has explained that a "suspicious" and "implausib[le]" explanation for a decision "gives rise to an inference of discriminatory intent." *Snyder v. Louisiana*, 128 S. Ct. 1203, 1210-12 (2008). In the employment context, "[p]roof that the defendant's explanation is unworthy of credence" is also "circumstantial evidence that is probative of intentional discrimination," and, based on a finding that a stated justification is implausible, "the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 134 (2000) (internal quotation marks omitted). Similarly, under the Media Bureau's framework for judging program-carriage discrimination, the inability of a cable operator to provide a legitimate, non-discriminatory reason for differential treatment supports an inference of affiliation-based discrimination. *See TWC Order* ¶¶ 21-25.

[154] *See, e.g.*, Gluck Test. ¶¶ 4-8.

[155] *See, e.g.*, Singer Test. ¶ 32; Cuddihy Test. ¶ 5 (noting new affiliate deal with operator in Roanoke).

[156] Singer Test. ¶ 32.

[157] *See id.*

DMA.[158] The vast majority of pay television subscribers in the Unlaunched Systems *other than those served by Comcast* receive MASN: 77% in the Harrisburg DMA; 81.5% in the Roanoke DMA; and 79.8% in the Tri-Cities DMA.[159] The Media Bureau has previously concluded that similar carriage decisions by other MVPDs are strong evidence of actual and potential demand for MASN's programming.[160] Indeed, the Bureau made such findings in the *HDO* here.[161]

*Second*, the history of carriage of Orioles games in areas covered by the Unlaunched Systems confirms demand for MASN. The evidence will show that baseball games of the Orioles have been televised in and around Harrisburg, the Tri-Cities region, and Roanoke/Lynchburg since at least the late 1980s (including on cable networks and over-the-air television stations).[162] Between 1996 and 2006, for example, two RSNs carried Orioles games in Harrisburg – CSN-MA and Home Team Sports.[163] Furthermore, Comcast "admits that CSN-MA has been carried on Comcast and certain former Adelphia systems in southwestern Virginia for some time and included telecasts of Orioles baseball games during the period that CSN-MA had the rights to those games."[164] The Media Bureau has previously determined that similar

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[158] *See* MASN_COM002104 (MASN Ex. 217).

[159] *See* Singer Test. ¶ 94.

[160] *See TWC Order* ¶ 34 ("the decision by four of the five largest MVPDs . . . in North Carolina to carry MASN . . . suggests the existence of actual or potential demand for MASN").

[161] *See HDO* ¶ 118 n.528 (concluding that carriage decisions by "DIRECTV and DISH" in "southwestern Virginia" evidence the value of MASN's programming in that area).

[162] Cuddihy Test. ¶ 13.

[163] *See id.* MASN's internal documents also reflect demand for MASN in Harrisburg. *See, e.g.*, MASN_COM004207 (MASN Ex. 215) [redacted]; MASN_COM001779 (MASN Ex. 216) [redacted]

[164] Answer at 37, ¶ 13.

evidence of a history of carriage of sports programming in an area is good evidence of actual and potential demand for such programming.[165]

*Third*, the historical record of Comcast's aggressive battles to secure Nationals rights for its affiliated RSN and to retain Orioles games for its affiliate is unmistakable evidence that Comcast places a high value on that programming. From the first rumors of possible relocation of the Expos to Washington, Comcast vied aggressively for rights to Nationals programming.[166] Comcast, moreover, took unprecedented steps after MLB awarded those rights to MASN, going so far as to implore MLB to abrogate the deal it had reached and to assign the Nationals rights to Comcast for carriage on Comcast's affiliated RSNs.[167] Indeed, in a letter to MLB, Comcast's president Steven Burke publicly promised that Nationals programming would be carried "*across the Nationals' territory immediately*" if those rights were granted to Comcast.[168]

The story is much the same with respect to Orioles rights. Comcast fought hammer and tong to keep the Orioles on CSN-MA, bringing (baseless) litigation in state court in an attempt to keep that programming.[169] [redacted]

[165] *See TWC Order* ¶ 34 (finding it significant that "Orioles games have been broadcast in North Carolina for nearly two decades prior to the 2007 MLB season, when MASN began to produce and exhibit the games").

[166] *See, e.g.*, COMMASN_00000139 (MASN Ex. 96) [redacted]; COMMASN_00007637 (MASN Ex. 91) [redacted]

[167] *See* Letter from Steven B. Burke to Allan H. (Bud) Selig at 2 (Apr. 6, 2006) (MASN Ex. 2) ("*April 6 Burke Letter*"); *see also* Testimony of David L. Cohen, Executive Vice President of Comcast, Before the U.S. House of Representatives Committee on Government Reform at 1 (Apr. 7, 2006) (MASN Ex. 3) (referring to the Settlement Agreement bringing the Nationals to Washington and establishing MASN as "'original sin'").

[168] *April 6 Burke Letter* at 2 (emphasis added).

[169] *See supra* p. 13.

[redacted][172]

All of these facts contradict Comcast's litigation-driven attempt now to downplay the value of MASN's Orioles programming.[173]

*Fourth*, Comcast's demand defense cannot be squared with carriage decisions that Comcast itself has made. Comcast agreed to carry MASN on some systems farther from Washington and Baltimore than the Unlaunched Systems: Comcast, for example, refuses to carry MASN on a cable system in the Washington DMA (Westmoreland (Montross)) that is a mere 54 miles from Washington.[174] But it is implausible that there is no demand for MASN's

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[170] *See* COMMASN_00004558 (MASN Ex. 118) [redacted]

[171] *See* COMMASN_00008372 (MASN Ex. 99) [redacted]

[172] COMMASN_00007729 (emphasis added) (MASN Ex. 107).

[173] Further evidence that, if Comcast owned the Orioles and Nationals rights, programming would be carried to full extent of Comcast's territory comes from the fact that [redacted] *See* COMMASN_00010286 (MASN Ex. 139) [redacted]; COMMASN_00010730 (MASN Ex. 140) [redacted]

[174] *See* MASN Ex. 1.

programming (e.g., Nationals, Orioles, Georgetown, and George Mason games) on a system in such close proximity to Washington when Comcast carries MASN on systems farther away. Comcast, for example, carries MASN on its Emporia system, which is 160 miles from Washington, D.C., and on its Staunton system, which is 130 miles from Washington, D.C.[175] Comcast's contradictory explanation for its carriage decisions renders its demand justification unfounded and itself compels an inference of discrimination,[176] suggesting that low demand did not drive Comcast's carriage decisions, but instead a desire to [redacted] chunks of MASN's territory in an effort to keep MASN's [redacted] at a level close to the level of CSN-MA.[177]

### d. Comcast's Expert Report Is Unreliable

To salvage credibility for its demand defense, Comcast has submitted a report by Mr. Gerbrandt that purports to show low viewer interest for Orioles and Nationals programming in the disputed regions. Setting aside that Mr. Gerbrandt's surveys are *post hoc*, apply standards that Comcast does not apply to its own RSNs, and are contradicted by objective evidence of actual and potential demand, the surveys are flawed in other key respects.

As an initial matter, the surveys did not ask the right question. Whether consumers would watch MASN in the disputed regions is a relevant issue in this case. But that is not what the surveys measured or what Mr. Gerbrandt analyzed. [redacted]

[175] *See id.*; *see also* Wyche Test. ¶ 8.

[176] *See Appelbaum v. Milwaukee Metropolitan Sewerage Dist.*, 340 F.3d 573, 579 (7th Cir. 2003) ("One can reasonably infer pretext from an employer's shifting or inconsistent explanations for the challenged employment decision.").

[177] COMMASN_00000301 (MASN Ex. 104).

[redacted] Suppose concert patrons were asked to identify their favorite composer. That Bach, Beethoven, and Mozart might obtain high marks does not establish that the patrons would shun performances of Brahms, Chopin, or Wagner.[178]

Critically, Mr. Gerbrandt admitted that he did not know how – *if at all* – these surveys would relate to viewership.[179] Even had Comcast asked the right question in its commissioned surveys, Mr. Gerbrandt made clear that consumer demand does "[n]ot necessarily" translate into television viewership.[180] This is so, he explained, because "[c]onsumers frequently demand things they think they want and then . . . realize that they . . . are no longer interested."[181] [redacted] In sum, he did not analyze the relevant question.[183]

### 3. Comcast's Cost-Based Defense Is Unfounded

Comcast has also suggested that MASN's high cost – that is, the per-subscriber rate that MASN charges MVPDs for carriage – is a legitimate, non-discriminatory basis for its carriage refusals.[184] Comcast asserts, for example, that MASN has "high . . . costs" and that MASN

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[178] For the same reason, Mr. Gerbrandt's [redacted]

[179] [redacted]

[180] *Id.* at 62.

[181] *Id.* at 62-63.

[182] *Id.* at 70-71.

[183] Certainly, an MVPD has no interest in baseball fans who do not watch games on television.

[184] Answer at 25-26, ¶¶ 43-44.

would be "the second most expensive network on Comcast's systems in southwestern Virginia and the third most expensive network on Comcast's system in Harrisburg."[185] Comcast's cost-based defense has no merit.[186]

As an initial matter, Comcast's high-cost defense fails for the same reason as its low-demand defense: Comcast fails to evaluate MASN's costs relative to the costs of Comcast's own RSNs (perhaps this is because, as the evidence shows, Comcast's [redacted] systematically favor the interests of affiliates). The key issue is how MASN compares to Comcast's affiliates.[187]

On that score, an expert study conclusively demonstrates both the reasonableness of MASN's rates and that MASN is either cheaper than or comparable to Comcast's affiliated RSNs. As explained in the testimony of Mr. Wyche, one measure for normalizing rates charged by RSNs is the per-subscriber per-major-pro-event ("PSPPE") valuation methodology. This approach to valuing RSN programming "is accepted in concept within the industry and considered objective" and measures the costs in terms of the value provided by an RSN.[188]

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[185] *Id.*

[186] That MASN would be one of the more expensive networks is not surprising. Comcast's internal documents reflect that this RSN programming is must-have programming. *See* COMMASN_00010306 (MASN Ex. 136) [redacted] And Comcast's own witness agrees that "[a]ll sports content, more or less, is very high priced." Bond Dep. at 285.

[187] *See TWC Order* ¶¶ 36, 42-48.

[188] Wyche Test. ¶ 16. Mr. Wyche's testimony details the virtues of the PSPPE approach. *See id.* ¶¶ 17-20. Comcast's internal documents demonstrate that Comcast, too, believes that such a methodology is appropriate for valuing RSNs. *See* COMMASN_00010246 (MASN Ex. 138) [redacted]

Applying this method to MASN, Wyche calculated a PSPPE of [redacted] with respect to the regions corresponding to the Unlaunched Systems.[189]

A comparison of MASN's PSPPE with the PSPPEs of Comcast's affiliated RSNs establishes that MASN is a "relative bargain."[190] MASN's PSPPE is less than [redacted] the PSPPE charged by CSN-Philly [redacted], [redacted] the PSPPE charged by CSN-MA in the Harrisburg DMA [redacted], and [redacted] than the PSPPE charged by CSN-MA in much of the Roanoke DMA.[191]

Furthermore, applying this PSPPE method to other RSNs that Comcast carries across the nation, Dr. Singer concluded that MASN's PSPPE is actually [redacted] than the average PSPPE fee [redacted][192] [redacted][193]

Comcast's high-cost defense also fails for multiple other reasons. *First*, the decisions of other major MVPDs to carry MASN at the *same* rate in the *same* areas at issue are objective, marketplace evidence that MASN's rates are commercially reasonable. As the Media Bureau has held, "the best and most persuasive evidence of fair market value is the objective price that RSN programming yields in the marketplace."[194] And, as Dr. Singer has explained, determining a fair market value for MASN is "particularly straightforward because *all MVPDs that carry*

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[189] *See* Wyche Test. ¶ 21.

[190] Singer Test. ¶ 57.

[191] *See id.*

[192] *Id.* ¶ 61.

[193] *Id.*

[194] *TWC Order* ¶ 46.

*MASN in the contested areas pay the same rate.*"[195] Testimony from industry expert Mr. Wyche confirms that the decisions of these other MVPDs to pay rates arrived at in arm's-length negotiations is strong evidence that MASN's rates are reasonable.[196]

*Second*, the implausibility of Comcast's cost-based defense is confirmed by the fact that Comcast has agreed to pay these same rates to MASN, sometimes no more than 25 miles from one of the Unlaunched Systems. As Mr. Wyche testifies, "Comcast itself has previously agreed to carry MASN on a basic or expanded basic tier on its cable systems elsewhere within MASN's Regions 3, 4, and 5 at the same per-subscriber rate at which MASN is seeking carriage on" the Unlaunched Systems.[197] Comcast has no explanation for why MASN's rates are justified in some parts of MASN's Television Territory but not others, especially given that many of the Unlaunched Systems are closer to Washington and Baltimore than systems Comcast *has* launched. This failure to set forth a consistent explanation for its carriage decision suggests that the real reason for Comcast's decisions has nothing to do with MASN's costs, but instead with Comcast's desire to [redacted] chunks of MASN's territory to keep its [redacted] at a level close to the number of Comcast subscribers receiving CSN-MA.[198]

*Third*, regression analysis confirms that MASN's rate falls comfortably within the range of rates that [redacted][199] Regression analysis is a particularly useful tool in gauging the value of MASN's programming because, in determining the relationship of one or more independent variables (here, the number

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[195] Singer Test. ¶ 52.

[196] *See* Wyche Test. ¶ 7.

[197] *Id.* ¶ 24.

[198] COMMASN_00000301 (MASN Ex. 104).

[199] Singer Test. ¶ 79.

of live major professional events offered by an RSN) to a dependent variable (here, the per-subscriber fee Comcast is willing to pay to carry an RSN in an intermediate zone), such analysis can control for the effects of other variables (such as income, population, distance from a home stadium, etc.).[200] The results of the regression analysis are conclusive: using data drawn from Comcast's own agreements [redacted],[201] and controlling for variables described above and outlined in Dr. Singer's testimony, Dr. Singer concludes that MASN's Region 4 rate is [redacted] of what MASN should charge based on Comcast's own agreements.[202] "The implication of this finding is that MASN's Zone 4 fee can be justified based on objective, marketplace data of what Comcast pays to carry other RSNs."[203]

### 4. Comcast's Capacity Defense Has No Merit

Comcast also suggested in its Answer that bandwidth constraints represent a legitimate, non-discriminatory reason for its refusal to carry MASN on the Unlaunched Systems.[204] This defense can be quickly rejected.

*First*, Comcast has adduced no evidence of bandwidth constraints, and its past conduct belies this explanation. During the August 2006 negotiations, Comcast represented to MASN that it lacked capacity to carry MASN on Adelphia systems, but it did not raise this as an issue with respect to *any* other system.[205] With respect to the Adelphia systems, moreover, Comcast made affirmative representations to this Commission that it would upgrade those systems

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[200] *See id.* ¶ 62

[201] *See id.* ¶ 66.

[202] *Id.* ¶ 77.

[203] *Id.*

[204] *See* Answer at 25-26, ¶ 44.

[205] *See supra* pp. 18-19.

expeditiously.[206] In addition, Comcast's witnesses have testified that most of the Adelphia systems now have plenty of capacity.[207] Finally, the existence of 22 other MVPDs that carry MASN conclusively disproves that bandwidth is an issue.

*Second*, even were Comcast using all of its capacity on the Unlaunched Systems, that is no defense. Non-discrimination obligations do not dissipate when all system capacity is in use. All cable operators have an incentive to utilize capacity fully, and it would nullify non-discrimination rules to allow that fact to serve as a defense of preferential treatment of affiliated networks. In fact, the Commission's rules contemplate that a lack of bandwidth is not a defense: they make clear that, as a remedy for discrimination, cable operators can be required to carry unaffiliated networks,[208] and that such carriage may require "the defendant to *delete existing programming* from its system to accommodate carriage."[209]

*Third*, on the majority of the Unlaunched Systems, Comcast carries an affiliated RSN.[210] It is thus no answer for Comcast to say that carrying MASN would require bandwidth. Comcast must establish a legitimate, non-discriminatory reason for the disparate treatment of affiliated and unaffiliated RSNs – i.e., allocating bandwidth to affiliated RSNs but not doing so for a similarly situated unaffiliated RSN. Comcast has never suggested such a rationale.

### 5. Comcast's Carriage of MASN Elsewhere in MASN's Television Territory Is No Defense

Lacking a legitimate reason for not carrying MASN on the Unlaunched Systems, Comcast has also attempted to defend its discriminatory conduct on the ground that "Comcast

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[206] *See supra* pp. 15-16.

[207] *See, e.g.*, Ortman Dep. at 346-48.

[208] *See* 47 C.F.R. § 76.1302(g)(1) (authorizing remedy of "mandatory carriage").

[209] *Id.* (emphasis added).

[210] *See* Orszag Report, Attach. 4.

carries MASN" on other systems in "MASN's territory."[211] This defense is without foundation for two reasons. *First*, Comcast does not, because it cannot, explain how carriage of MASN in *some* parts of MASN's Television Territory relieves Comcast of non-discrimination obligations *elsewhere* in the Television Territory.

*Second*, Comcast's carriage of MASN in some parts of its Television Territory hardly demonstrates good-faith dealing. Comcast agreed to distribute MASN on some systems only after more than a year of unreasonably refusing to carry MASN and in the wake of a ruling by this Commission that Comcast's conduct constituted a *prima facie* violation of the Cable Act.[212] That Comcast was forced under pain of a finding of liability to carry MASN does not support the inference that Comcast is acting in good faith toward MASN now with respect to the Unlaunched Systems. Just the opposite: Comcast's history of discriminatory conduct compels the inference that Comcast grudgingly carried MASN on most of its systems and is retaliating against MASN in a discriminatory fashion by not distributing MASN on the Unlaunched Systems.[213]

Comcast also touts in its Answer that, in "Lancaster, Pennsylvania and New Castle and Kent Counties, Delaware[,] Comcast actually dropped CSN-MA to make room for MASN."[214] But Comcast neglects to mention two things that have been revealed in discovery: [redacted]

[redacted]

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[211] Answer at 22, ¶ 38.

[212] *See supra* pp. 12-16.

[213] *See Garrett v. Hewlett-Packard Co.*, 305 F.3d 1210, 1217 (10th Cir. 2002) ("evidence of pretext may include, but is not limited to, the following: prior treatment of plaintiff; . . . disturbing procedural irregularities . . . ; and the use of subjective criteria") (internal quotation marks omitted).

[214] Answer at 29-30, ¶ 50.

[redacted] and, second, Comcast's [redacted]

[redacted][216]

## D. Comcast Has Restrained MASN's Ability To Compete Fairly

### 1. Comcast's Discriminatory Carriage Decisions Materially Restrain Fair Competition Between MASN and Comcast's Affiliated RSNs

Comcast's discriminatory refusal to carry MASN on the Unlaunched Systems – virtually all of which carry a Comcast affiliated RSN – "restrains . . . [MASN's] ability to compete fairly" in those markets and in the RSN marketplace generally.

To begin with, Comcast is the largest MVPD in the geographic areas covered by the Unlaunched Systems. On those systems, moreover, Comcast carries affiliated RSNs. Comcast's discriminatory carriage decisions undoubtedly restrain MASN's ability to compete fairly with Comcast's affiliated RSNs (and other networks) in those markets in light of Comcast's dominant position in the marketplace. (Indeed, the very fact that Comcast would go to great lengths, detailed above, to contain the size of MASN is powerful evidence that Comcast sees a competitive benefit to its discriminatory carriage decisions.)

More broadly, Comcast's conduct affects MASN's ability to compete fairly across MASN's Television Territory. Unlike national programming networks, RSNs are, by definition, regional in nature and they must pay substantial fees to secure access to professional sports rights.[217] As the Media Bureau has held, "RSNs, unlike national networks, . . . require access to the maximum number of subscribers within their footprints, *including the RSN's extended inner*

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[215] *See* Orszag Report, Attach. 4.

[216] *See, e.g.*, [redacted]

[217] *See* Cuddihy Test. ¶ 38; Wyche Test. ¶ 46.

*markets in order to compete effectively*."[218] The evidence in this proceeding will confirm that MASN, like other RSNs, needs access to a maximum number of subscribers within its geographic footprint to compete successfully.[219]

Two examples illustrate the competitive harm to MASN from Comcast's conduct. *First*, Comcast's conduct impairs MASN's ability to compete for sports programming rights. Rights to broadcast professional and collegiate sports are the lifeblood of an RSN. Comcast views MASN as a direct competitor with its affiliated RSNs for competition to such sports programming rights.[220] But MASN needs wide distribution within its Television Territory to compete fairly for sports programming rights. When negotiating programming rights deals, professional sports teams seek to deal with networks with broad distribution – that is, those networks that allow the team access to the full territory designated by the league.[221] With substantial gaps in MASN's footprint (a direct result of Comcast's discriminatory conduct), MASN is not able to compete as effectively as it otherwise would in acquiring sports rights.[222]

In addition, the loss of revenue arising from Comcast's carriage decisions affects MASN's ability to bid for sports rights. The potential revenue streams represented by the [redacted] of Comcast subscribers in the Unlaunched Systems are significant.[223] With the price of acquiring sports programming content on the rise throughout the industry, MASN can compete with other RSNs in both areas, including again CSN-MA and CSN-Philly, only if it can afford to

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[218] *TWC Order* ¶ 31.

[219] *See* Cuddihy Test. ¶¶ 37-45; *see also* Wyche Test. ¶ 13.

[220] *See supra* pp. 26-29.

[221] *See* Cuddihy Test. ¶¶ 38-40.

[222] *See id.*; Cuddihy Dep. at 175; Singer Test. ¶ 31.

[223] *See* Cuddihy Test. ¶ 38.

pay the high price of acquiring the programming consumers demand.[224] Comcast's carriage decisions, however, have caused MASN to lose access to nearly [redacted] subscribers (more than the number of Comcast subscribers in the cities of Washington and Baltimore) and thus to [redacted] of dollars over the lifetime of the agreement that could be used to acquire other sports programming rights to compete in the RSN marketplace.

*Second*, Comcast's refusal to carry MASN on the Unlaunched Systems impairs MASN's ability to secure advertising revenue. MASN sells three advertising packages. The prices that MASN charges for those packages are linked in important ways to the number of viewers that will get access to MASN's programming and thus to the advertising.[225] Accordingly, a reduction in the number of subscribers MASN reaches necessarily reduces advertising revenues. Even more importantly, geographic gaps – such as those caused by Comcast's discriminatory refusal to carry MASN – in advertising can restrain an RSN's ability to secure advertising deals with larger advertisers that seek to advertise across a region. This principle is confirmed by both economic research[226] and the facts of this case.[227] Specifically, the evidence will show that geographic gaps in coverage can affect MASN's ability to secure and retain advertising deals.[228] Advertising revenues are an important source of capital for RSNs.

### 2. Comcast's Contrary Arguments Are Unavailing

Comcast will argue that, even if it is guilty of affiliation-based discrimination, that discrimination is not prohibited by the Cable Act or the Commission's rules because Comcast's

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[224] *See id.*

[225] *See id.*; *see also* Singer Test. ¶ 41.

[226] *See* Singer Test. ¶ 42 (citing economic research showing that "gaps" in coverage can have "grave consequences").

[227] *See id.* ¶ 43.

[228] *See* Cuddihy Test. ¶¶ 41-43; Singer Test. ¶ 43.

conduct has not bankrupted MASN. That view of the law is inconsistent with the text, history, and purposes of the Cable Act, as well as the Media Bureau's holdings.

The Cable Act and the Commission's rules prohibit all discrimination that restrains a network's "ability to compete *fairly*," not to compete at all. The most natural reading of that prohibition is that vertically integrated cable companies may not favor the interests of their affiliated RSNs when that discrimination has the effect of undermining fair competition between affiliated and unaffiliated RSNs. Preserving "fair" competition – attempting to simulate the conditions in which a cable company has not vertically integrated – is different from preserving competition "at all" by preventing a network from being put out of business. If Congress or this Commission had intended to limit the bar on discrimination to instances in which an unaffiliated network would be put out of business, either could have said so directly.[229] They did not.

The legislative history and purposes of the Cable Act are consistent with that reading of the text. Congress found that "vertical integration gives cable operators the incentive and ability to favor their affiliated programming services" by, among other things, unreasonably refusing to carry unaffiliated programmers or "giv[ing] its affiliated programmer a more desirable channel position than another programmer."[230] The relevant Senate Report explained, for example, that "the guy who controls a monopoly conduit is in a unique position to control the flow of programming traffic to the advantage of the program services in which he has an equity investment and/or in which he is selling advertising availabilities, and to the disadvantage of those services . . . in which he does not have an equity position."[231] Congress was therefore

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[229] *See Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005) (the Supreme Court does "not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply").

[230] S. Rep. No. 102-92, at 25, 1992 U.S.C.C.A.N. at 1158.

[231] *Id.* at 26, 1992 U.S.C.C.A.N. at 1159.

concerned broadly that cable companies would abuse market power to the economic advantage of affiliates and to the detriment of unaffiliated networks. Reading the program-carriage non-discrimination mandate as inapplicable so long as Comcast does not bankrupt MASN would countermand that congressional purpose. For those and similar reasons, the Media Bureau has already rejected Comcast's blinkered reading of the statute.[232]

Comcast has also argued that its carriage decisions cannot harm MASN because the Unlaunched Systems are in MASN's extended inner markets, not MASN's core markets. But access to subscribers in extended inner markets is important to MASN's ability to compete effectively.[233] As Dr. Singer explains, "[b]ecause RSNs operate within a fixed geographic territory, it is particularly important that they achieve a high rate of market penetration."[234] For that reason, "there is no question that MASN has been forced to operate with higher average costs" because of Comcast's refusal to carry MASN for [redacted] of MASN's subscribers – meaning that MASN's ability to compete fairly "for localized content, advertisers, and viewers" has been impaired.[235] Furthermore, as explained above, the gaps in MASN's Television Territory created by Comcast's decisions impair MASN's ability to compete for, among other things, advertising dollars and programming rights.[236] Comcast's willingness and ability to inflict these harms on

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[232] *See TWC Order* ¶¶ 30-31.

[233] *See id.* ¶ 31.

[234] Singer Test. ¶ 36.

[235] *Id.* ¶ 37.

[236] *See supra* pp. 57-59. Comcast's past reliance on an ex parte letter to the Commission from MASN in the *Adelphia* proceeding is misplaced for similar reasons. At the time of the letter, MASN was carrying the Nationals, not the Orioles, and the letter states the unremarkable fact that there was "diminished interest *in the Nationals*" in "rural Pennsylvania" as compared to the Washington DMA, which is the "core" of "the Nationals' fan base." That statement is about comparative, not absolute, demand, and references only the Nationals, not the Orioles. MASN now carries the games of the Orioles, a franchise with long-standing ties to the Harrisburg DMA and the Unlaunched Systems, as well as a lineup of non-baseball programming.

MASN by discriminatorily refusing carriage in MASN's extended inner markets rather than its core markets should be no defense to discrimination.

### E. Comcast's Statute-Of-Limitations Defense Should Be Rejected

Comcast has also asserted that MASN's Complaint is time-barred. Comcast is wrong, as the Media Bureau held. This case is about Comcast's unreasonable refusal to carry MASN on the Unlaunched Systems. From the time that MASN discovered that Comcast would not carry MASN on the Unlaunched Systems until the filing of its Complaint, MASN sought to reach a negotiated agreement with Comcast and did so under a tolling agreement with Comcast.

Those negotiations had appeared to reach an impasse in March 2008. At that time, MASN sent a letter to Comcast pursuant to 47 C.F.R. § 76.1302(a) and (b).[237] MASN explained that, "[g]iven that Comcast carries affiliated RSNs in these geographic regions, that Comcast has offered no legitimate business justification for its differential treatment of MASN and its affiliated RSNs, and that Comcast's affiliates have historically carried Orioles programming in these areas, Comcast's refusal to carry MASN is in direct violation of 47 C.F.R. § 76.1301(c)."[238] In response, Comcast signaled a willingness to engage in further discussions, and MASN pursued a last-ditch effort to reach a negotiated agreement. Those negotiations failed, and MASN filed its Complaint on July 1, 2008, well within one year of MASN "notif[ying] [Comcast] that it intend[ed] to file a complaint with the Commission" based on Comcast's unreasonable refusal to carry MASN on the Unlaunched Systems.[239] Under the Commission's rules, MASN's Complaint was accordingly timely filed.

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[237] *See* MASN Ex. 66.

[238] *Id.*

[239] 47 C.F.R. § 76.1302(f)(3).

Comcast has nonetheless argued that MASN's Complaint is untimely. That is so, Comcast says, because "[t]he only relevant triggering event is the date on which Comcast and MASN entered into the Term Sheet" and that occurred in August 2006, outside a one-year statute of limitations.[240] This argument makes no sense. MASN's Complaint addresses what Comcast has *refused* to do since the Term Sheet – *viz.*, carry MASN on the Unlaunched Systems. The Commission's rules proscribe discriminatory refusals to carry a network,[241] and, under those rules, the period for bringing such a claim runs from "one year of the date on which . . . [a] party has notified a multichannel video programming distributor that it intends to file a complaint."[242]

The Media Bureau thus had no difficulty rejecting this statute-of-limitations defense.[243] That decision is controlling here[244] and is, in any event, correct.

## II. THE APPROPRIATE REMEDY IS CARRIAGE ON THE TERMS PROPOSED BY MASN

Once this Tribunal concludes that Comcast has violated the Cable Act's and the Commission's prohibition on affiliation-based discrimination, the remedy that MASN seeks is straightforward: MASN seeks carriage on the Unlaunched Systems on the *same* terms and conditions to which Comcast has agreed in other parts of MASN's Television Territory. Other major MVPDs have agreed to the same terms in the geographic areas corresponding to the Unlaunched Systems. That remedy is undoubtedly appropriate: substantial economic evidence establishes that MASN's proposed rates are a relative bargain, compared both to Comcast's

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[240] Answer at 19, ¶ 34.

[241] *See* 47 C.F.R. § 76.1301(c).

[242] *Id.* § 76.1302(f)(3).

[243] *See HDO* ¶¶ 102-105.

[244] *See supra* p. 26.

affiliated RSNs and to RSNs that Comcast carries across its national footprint.[245] After the Tribunal concludes that Comcast's carriage decisions represent prohibited affiliation-based discrimination, it therefore should have no difficulty concluding that carriage on MASN's terms and conditions is apt.

Mandatory carriage of MASN by Comcast is compelled by the combination of basic remedial principles and the program-carriage rules. Congress and the Commission have sought to prohibit affiliation-based discrimination, attempting to put unaffiliated networks in the position they would be in but-for the strong discriminatory incentives created by vertical integration and to prevent special treatment of affiliates.[246] The evidence at trial will establish that affiliation-based discrimination played a substantial role in Comcast's carriage decisions with respect to MASN on the Unlaunched Systems. The Commission's rules make clear, moreover, that "mandatory carriage" is a remedy for discrimination.[247] Because mandatory carriage is the only remedy that could put MASN in the position that it would have been in but-for Comcast's discriminatory carriage decisions, that remedy is appropriate here.

Such a remedy is undoubtedly in the public interest. *First*, there is a presumptive public interest in enforcing federal law and in remedying discrimination that Congress and the Commission have sought to proscribe.[248] The evidence here is overwhelming that Comcast has engaged in a campaign of discrimination against MASN and maintained a pattern and practice of discrimination that strikes at the core of Congress's and the Commission's concerns regarding

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[245] *See* Part I.C.3., *supra*.

[246] *See supra* pp. 24-26.

[247] 47 C.F.R. § 76.1302(g)(1).

[248] *See* Memorandum Opinion and Order, *Cablevision Sys. Corp.*, 11 FCC Rcd 12669, ¶ 7 (1996) ("passage of the 1992 Cable Act, incorporating the must carry provisions, is *prima facie* evidence that carriage . . . is in the public interest").

the anti-competitive and anti-consumer effects of vertical integration.[249] In similar circumstances, the Media Bureau has had no trouble concluding that mandatory carriage is appropriate.[250]

*Second*, in this context, the Commission has already recognized that decisions by vertically integrated cable companies not to carry unaffiliated RSNs based on affiliation directly harm consumers by denying access to must-have programming.[251] The Commission approved the Adelphia transaction – redounding to Comcast's benefit – while at the same time recognizing that the transaction would "increase the incentive and ability of . . . [Comcast] to deny carriage to RSNs that are not affiliated with them."[252] That discrimination, the Commission found, would directly harm consumers who would be "unable to view" must-have "RSN[ ] programming" of unaffiliated networks.[253] The Commission imposed an arbitration remedy to "alleviate the potential harms to viewers who are *denied access to valuable RSN programming* during protracted carriage disputes."[254] Comcast's carriage decisions in this case have, in fact, resulted in Comcast's subscribers in the affected regions being denied the ability to watch MASN's must-have professional and collegiate programming for nearly *three* years. Only a remedy of mandatory carriage could advance the public interest in that respect.

No countervailing public interest would warrant the Commission *not* remedying Comcast's discrimination. Comcast can be expected to take the position that a remedy of mandatory carriage would raise First Amendment concerns. That is false. As the D.C. Circuit

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[249] *See supra* Part I.

[250] *See TWC Order* ¶ 55.

[251] *See Adelphia Order* ¶¶ 189-190.

[252] *Id.* ¶ 189.

[253] *Id.*

[254] *Id.* ¶ 191 (emphasis added).

and the Supreme Court have held, protecting unaffiliated programmers from anti-competitive conduct and promoting programming diversity are not content-based aims.[255] Furthermore, as the Media Bureau has concluded, requiring carriage as a remedy for discrimination poses no First Amendment concerns.[256]

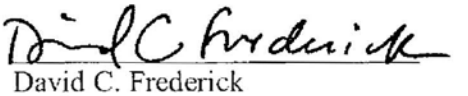
## III. LEGAL AUTHORITIES

MASN has relied on the legal authorities set forth in the Table of Authorities to this brief.

## CONCLUSION

For the foregoing reasons, this Tribunal should conclude that Comcast has engaged in affiliation-based discrimination that has restrained MASN's ability to compete fairly by refusing to carry MASN on the Unlaunched Systems. The Tribunal should order carriage on the terms set forth in the parties' carriage agreement. Comcast should also be ordered to make MASN whole as a remedy for its prohibited discrimination.

Respectfully submitted,



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[255] *See Time Warner Entm't Co. L.P. v. United States*, 211 F.3d 1313, 1316-18 (D.C. Cir. 2000); *Time Warner Entm't Co. L.P. v. FCC*, 93 F.3d 957, 969 (D.C. Cir. 1996); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994).

[256] *See TWC Order* ¶ 49 (rejecting TWC's First Amendment challenges).